DOCKET

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No. 83-1624-CFY
Status: GRANTED

Title: United States, Petitioner
v.
James Vincent Albertini

Docketed:
April 3, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Sims, Charles S.

Entry	Date	Note	Proceedings and Orders
1	Feb 22 1984		Application for extension of time to file petition and order granting same until April 3, 1984 (Rehnquist, February 23, 1984).
2	Apr 3 1984	G	Petition for writ of certiorari filed.
3	Jun 5 1984		Brief of respondent James Vincent Albertini in opposition filed.
4	Jun 5 1984		DISTRIBUTED. September 24, 1984
5	Jun 19 1984	X	Reply brief of petitioner United States filed.
6	Sep 14 1984	X	Supplemental brief of petitioner United States filed.
8	Sep 28 1984		Record requested.
9	Oct 10 1984		Record filed.
10	Oct 10 1984		Certified C.A. proceedings and reporter's transcript, Volumes I & II, received.
11	Oct 12 1984		Record filed.
12	Oct 18 1984		REDISTRIBUTED. October 26, 1984
14	Oct 29 1984		REDISTRIBUTED. November 2, 1984
16	Nov 5 1984		REDISTRIBUTED. November 9, 1984
18	Nov 13 1984		REDISTRIBUTED. November 21, 1984
20	Nov 26 1984		REDISTRIBUTED. November 30, 1984
21	Dec 3 1984		Petition GRANTED. In addition to the question presented in the petition, the parties are requested to address the following question: Whether the respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. Section 1382?
23	Jan 17 1985		Order extending time to file brief of petitioner on the merits until January 31, 1985.
24	Jan 31 1985		Joint appendix filed.
25	Jan 31 1985		Brief of petitioner United States filed.
26	Mar 6 1985		Brief of respondent James Vincent Albertini filed.
27	Mar 15 1985		SET FOR ARGUMENT. Monday, April 15, 1985. (1st case)
28	Mar 22 1985		CIRCULATED.
29	Apr 8 1985	X	Reply brief of petitioner United States filed.
30	Apr 15 1985		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

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No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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36 pp

QUESTION PRESENTED

Whether the First Amendment prohibits the enforcement of 18 U.S.C. 1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer, against a civilian who is subject to a valid bar order but reenters the base during an "open house" for the purpose of engaging in an antiwar demonstration.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 710 F.2d 1410.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1983 (App., *infra*, 17a). A petition for rehearing was denied on January 4, 1984 (App., *infra*, 16a). On February 23, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to April 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

STATEMENT

1. In March 1972, respondent and a companion entered Hickam Air Force Base, Hawaii, ostensibly to present a letter to the commanding officer. Instead, they obtained access to secret Air Force documents and destroyed them by pouring animal blood on them. Respondent was convicted of conspiracy to injure government property in violation of 18 U.S.C. 371 and 1361. He also received a "bar letter"—a letter from the commander of Hickam that informed him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry." App., *infra*, 3a n.1.

In March 1981, respondent, according to his own testimony, entered a secured area at Camp Smith, Hawaii, and engaged in what he described as a "civil disobedience action" that involved defacing government property (Tr. 62). For this action the commander of Hickam Air Force Base issued respondent another bar letter.[1]

Later in 1981, respondent reentered Hickam during "Armed Forces Day," the base's annual open house. On this day, members of the general public, who ordinarily can enter Hickam only with permission, are invited to enter certain portions of the base, and various events are held for their benefit. For example, the Air Force displays aircraft and other equipment; servicemen engage in parachute jumps and "flyovers"; and various amusements are provided, such as musical performances and carnival rides. App., *infra*, 2a-3a.

Respondent was apprehended during the open house while he was engaged in an antiwar demonstration that involved leafleting and holding up a sign (App., *infra*, 3a). He was charged with violating 18 U.S.C. 1382, which makes it unlawful for any person to reenter a military installation "after having been * * * ordered not to reenter by any officer or person in command * * *." After a trial before a judge in the United States District Court for the District of Hawaii, respondent was convicted and sentenced to three months' imprisonment.

2. The court of appeals reversed respondent's conviction on the ground that it violated the First Amendment (App., *infra*, 1a-15a). After rejecting respondent's contention that advertisements for the open house constituted permission for him to reenter Hickam (*id.* at 4a), the court of appeals began its analysis by

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[1] This bar letter was sent to respondent by registered mail but was returned unclaimed.

discussing at length whether Hickam was a "public forum" during the open house (*id.* at 4a-13a).

The court acknowledged that "[a] military base, even one open to the public, is not a traditional public forum" (App., *infra*, 5a). But the court concluded that "the open portions of Hickam Air Force Base" during the open house "were areas over which the military had effectively abandoned control of access" (*id.* at 8a-9a). For this reason, the court held, Hickam during the open house was "a public forum," or at least "a 'limited public forum'" (*id.* at 9a, 10a). In reaching this conclusion, the court of appeals explicitly disagreed (*id.* at 11a-13a) with *Persons for Free Speech at SAC* v. *United States Air Force*, 675 F.2d 1010 (8th Cir.), cert. denied, 459 U.S. 1092 (1982).

The court further ruled that respondent's "manner of expression was not basically incompatible with [the] activity of Hickam at that particular time" (App., *infra*, 11a). The court accordingly stated (*id.* at 13a): "We conclude that members of the public had a first amendment right to hold signs and pass out leaflets at Hickam Field on Armed Forces Day."

The court of appeals then briefly considered the significance of respondent's bar letter (App., *infra*, 13a-14a) and held that the bar letter did not alter its conclusion that respondent's "actions on Armed Forces Day were constitutionally protected" (*id.* at 15a). The court of appeals reached this result on the authority of *Flower* v. *United States*, 407 U.S. 197 (1972), which, it stated, established that "the military loses its power to exclude when a base becomes a public forum" (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is incorrect, and it potentially jeopardizes a worthwhile and important military program. Contrary to the court of appeals' approach, this case does not concern the right to leaflet or demonstrate during an open house. Rather, the issue is whether the prohibition against reentering a base contained in 18 U.S.C. 1382—a content-neutral prohibition that is wholly unrelated to the regulation or suppression of speech—can be enforced against respondent, who was the holder of a valid bar letter issued because he had engaged in acts of destructive vandalism.

There is no basis for the court of appeals' conclusion that Section 1382 cannot be applied during an open house. Indeed, the need to exclude persons who have demonstrated themselves to be threats to the security of a military installation is particularly acute during an open house, because much of the base is open—providing easier access to sensitive areas that remain closed—and the crowds of civilians provide cover for any person determined to engage in destructive acts. The possibility that enforcing Section 1382 against respondent would have an incidental effect on his First Amendment rights, by forcing him to demonstrate (if he so desires) outside the entrance of the base instead of on the base itself, does not warrant a different result, especially since respondent's own previous unlawful acts were the cause of the restriction.

Open houses are conducted at many military installations; they serve an important function in alleviating the isolation of the military from the civilian community and in informing citizens about the military. Because

the court of appeals' decision significantly and unjustifiably augments the security problems in conducting the open house program, and thus will discourage the holding of open houses, review by this Court is warranted.

1.a. The decision of the court of appeals is plainly incorrect.[2] The court of appeals analyzed this case as if the base commander were asserting the right to exclude leafleters and demonstrators from the open house at Hickam. But that is not the issue in the case at all; it is immaterial to the legal issue presented by this case that respondent was first identified and apprehended by military authorities while he was engaged in a demonstration.

Instead, this case concerns the application of the wholly neutral prohibition of 18 U.S.C. 1382, which makes it unlawful for any person to reenter a military installation without permission after having received a bar letter. Respondent was prosecuted not for demonstrating but for reentering the base after he had been barred from doing so. The prohibition of Section 1382, which respondent violated, makes no reference to speech; it is unrelated to the content of speech, or indeed even to whether speech is occurring at all. It is supported by a "governmental interest * * * unrelated to the suppression of * * * expression" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968))—specifically, the

[2] We note that the court of appeals' decision cannot be reconciled with dictum in *Persons for Free Speech at SAC*, 675 F.2d at 1020 n.9: "[I]t is within the base commander's discretion to admit or deny admittance to [an] open house to people who have previously been issued valid 'ban and bar' letters, whether issued that day or at some earlier time."

military's legitimate need to protect the security of its installations, and "the historically unquestioned power of a commanding officer * * * to exclude civilians from the area of his command" (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)). This power is "[a] necessary concomitant of the basic function of a military installation" (*Greer* v. *Spock*, 424 U.S. 828, 838 (1976)).

There is, moreover, no question about the validity of respondent's bar letter. Respondent does not, and cannot, claim that he received the bar letter for engaging in activities protected by the First Amendment. Respondent does not appear to claim—and in any event the courts below did not find—that he was selectively prosecuted for engaging in protected activities. And while respondent asserted that the bar letter was stale, the court of appeals expressly declined to address this contention (App., *infra*, 4a). In short, respondent was subject to a lawful bar order, and by entering the base—for any purpose—he violated a neutral prohibition that is wholly unrelated to speech. The mere fact that he added activities that, we may assume, were protected by the First Amendment to the unlawful act of reentering the base does not exempt him from criminal liability for that act. See *Holdridge* v. *United States*, 282 F.2d 302, 311 (8th Cir. 1960) (Blackmun, J.).

b. Arguably, Section 1382, as applied to this case, did have an incidental effect on respondent's ability to exercise his First Amendment rights. But as this Court noted in rejecting the claims of other persons who sought to engage in expressive activities on a military installation, a neutral regulation is not invalid merely because it prevents people from "'propagandiz[ing] protests or views * * * whenever and however and wherever they please.'" *Greer*, 424 U.S. at 836 (quoting

Adderly v. *Florida*, 385 U.S. 39, 47-48 (1966)). There is no doubt that Hickam did not have to hold an open house; it could have excluded civilians at all times. Since that is true, it is difficult to see why Hickam could not exclude a category of civilians—those holding bar letters—that is defined without reference to the content of speech or to the fact that a person has engaged, or proposes to engage, in expressive activities.

The court of appeals' "public forum" analysis is at best of limited utility in this context. This Court has recognized that a military base "does not become a 'public forum' simply because members of the public are permitted to come and go at will" (*United States* v. *Grace*, No. 81-1863 (Apr. 20, 1983), slip op. 6 (citing *Greer*, 424 U.S. at 836)). And the court of appeals itself recognized (App., *infra*, 5a) that Hickam during the open house was not a traditional public forum in which "the rights of the state to limit expressive activity are sharply circumscribed" (*Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7). Moreover, even where such a forum is involved, the Court has upheld a content-neutral regulation if it "serve[s] a significant government interest, and leave[s] open ample alternative channels of communication." *Id.* at 7-8. See *Grace*, slip op. 5; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981) (quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). See also *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

Section 1382 easily meets these criteria: it is plainly content-neutral, and the government interests supporting it greatly outweigh any incidental effect on expression. Section 1382 is designed to prevent people who are proven risks to the security or good order of a military base from entering it. Respondent, for example, had been convicted of engaging in destructive acts of vandalism and had demonstrated his willingness to engage in such acts when given an opportunity to enter a military installation. The Air Force's interest in deterring him from entering a base is obviously very strong.

Moreover, this interest is, if anything, even stronger during an open house. When some areas of a base are open, it is easier for a person determined to engage in vandalism to gain access to the sensitive areas that remain closed. The crowds of strangers, and the generally less orderly setting, provide a convenient cover for such an individual. By contrast, the impact on respondents' rights is limited; he was free to demonstrate anywhere off the base, including just outside its entrance. In addition, respondent could have followed the "alternative" course of not engaging in the unlawful conduct that caused him to receive a bar letter in the first place.

We note that respondent, or any other person subject to a bar letter, is free to challenge the letter either in a proper action for declaratory relief (after exhausting administrative remedies by appealing to the commanding officer of the base) or by raising its invalidity as a defense to a prosecution under Section 1382. A bar letter cannot be issued in retaliation for the exercise of

rights protected by the Constitution or for the purpose of preventing a person from exercising those rights. See *Kiiskila* v. *United States*, 433 F.2d 745 (7th Cir. 1970) (en banc). See also *Cafeteria Workers*, 367 U.S. at 897-898. A bar letter issued for such an impermissible purpose cannot support a conviction under Section 1382. Moreover, Department of Defense regulations specifically provide that a base commander may not exercise his authority to deny access to the base "in an arbitrary, capricious, or discriminatory manner" and that this authority must be "judiciously applied" on the basis of "reasonable grounds" (DOD Directive No. 5200.8(C) (July 29, 1980)). Air Force regulations further specify that a bar order "must be reasonable in relation to [the commander's] responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon." AF Regulation 355-11(1)(b) (Sept. 10, 1971). See *Serrano Medina* v. *United States*, 709 F.2d 104, 109-110 (1st Cir. 1983).

c. The court of appeals' reliance in *Flower* v. *United States* was plainly inappropriate. *Flower* stands only for the proposition we just noted: a person cannot be prosecuted under Section 1382 on the basis of a bar letter that was issued because he engaged in constitutionally protected activity. Flower was "distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio, Texas" (407 U.S. at 197). This street, and the installation, were open to the public at all times (*id.* at 198); Flower had previously received a bar letter, and he was prosecuted under Section 1382. But it was a matter of record that Flower had received the bar letter for engaging in the same activity—leafleting on the open base. See 407

U.S. at 197; *United States* v. *Flower*, 452 F.2d 80, 82, 87 (5th Cir. 1971). The Court determined that, in the context of the military base at issue in *Flower*, this activity was constitutionally protected (407 U.S. at 198-199). Since the bar letter had been issued because Flower engaged in protected activity, Flower's conviction was reversed.

By contrast, there is no suggestion, and there can be no suggestion, that respondent received a bar letter for engaging in activities protected by the First Amendment. It is wholly implausible to suppose, as the court of appeals did, that *Flower* establishes that once a base commander permits members of the public to enter his base in large numbers, he loses all authority to exclude any person, no matter how justifiable—and unrelated to speech or expression—his reasons for doing so. See *Greer*, 424 U.S. at 838 n.10.

Moreover, in relying on *Flower*, the court of appeals appears to have ignored this Court's admonition in *Greer*, 424 U.S. at 835-836:

> The decision in *Flower* was * * * based upon the Court's understanding that New Braunfels Avenue was a public thoroughfare in San Antonio no different from all the other public thoroughfares in that city * * *.
>
> That being so, the Court perceived the *Flower* case as one simply falling under the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks * * *.
>
> * * * * *
>
> The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitution-

al law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now.

2. Open houses at military bases are extremely common; the Air Force informs us that it has issued a directive urging every base commander to hold an open house at least annually. The open house program is an important means of maintaining good relations between the base and its surrounding community, not only because it is a display of hospitality but also because it demonstrates to the community the public services that the installation can provide.

Perhaps more important, open houses provide civilians with a direct exposure to a military installation and military life. The court of appeals attached considerable significance to its perception that the Air Force was using the open house at Hickam as a means of "speaking" about itself. See, *e.g.*, App., *infra*, 8a-11a. But it is one of the primary responsibilities of the government to inform citizens of its activities so that they may evaluate its performance. See *Barr* v. *Matteo*, 360 U.S. 564, 575-575 (1959) (plurality opinion of Harlan, J.); *id.* at 577 (opinion of Black, J.). Such communications serve the very First Amendment values that respondent invokes.[3]

[3] See T. Emerson, *The System of Freedom of Expression* 698 (1970): "Participation by the government in the system of freedom of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade * * *. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources."

It is, moreover, particularly vital that these lines of communication be kept open in the case of the military. The military "is, by necessity, a specialized society separate from civilian society" (*Parker* v. *Levy*, 417 U.S. 733, 743 (1974); see also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 367-368 (1976)). It is reasonable for the government to attempt to ensure that the mutual isolation of the military and civilian communities, which is necessary to a degree, not become excessive and problematic. The open house program is a principal means used by the government for alleviating this isolation.

It is of course natural for the military, when presenting itself to the civilian public at an open house, to attempt to create a pleasant atmosphere and to portray itself in a favorable light. But the military is also fully prepared to respect the First Amendment rights of those who attend open houses and hold unfavorable views of the military or of government policy. What no commander can responsibly tolerate is a threat to the security of the base. As we have noted, any open house necessarily increases security risks; persons with free access to the open areas of the base will find it easier to reach the secured areas, and the crowds of civilians provide cover for unlawful activities.

The court of appeals' holding, if it prevails, will augment these problems by denying to base commanders the authority to exclude from the open house persons whose previous conduct has proven them to be security

threats. Indeed, because of the large number of military installations in the Ninth Circuit, the court of appeals' decision in this case has already caused difficulties, including the cancellation of at least one open house.[4] Because the court of appeals, on the basis of an erroneous interpretation of the First Amendment and of this Court's governing precedents, has unjustifiably burdened the government's efforts to carry out a worthwhile and important program to enhance communications and understanding between the military and civilian communities, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APRIL 1984

[4] We are advised that Davis-Monthan Air Force Base, Arizona, has indefinitely postponed its open house program in response to the court of appeals' decision and is awaiting the resolution of this litigation.

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT
No. 82-1090

UNITED STATES OF AMERICA, APPELLEE,
v.
JAMES VINCENT ALBERTINI, APPELLANT.

Appeal from the United States District Court
for the District of Hawaii.

Argued and Submitted Oct. 22, 1982.
Decided July 22, 1983

Before: CANBY, NORRIS and REINHARDT, Circuit Judges

CANBY, Circuit Judge

Defendant James Vincent Albertini appeals from his conviction under 18 U.S.C. § 1382 (1976) for illegal reentry onto a military base. Albertini reented Hickam Air Force Base during an "open house" to distribute anti-war pamphlets. He contends that this activity was protected by the first amendment. We agree, and we reverse the conviction.

FACTS

On May 16, 1981, Hickam Air Force Base held its annual "Armed Forces Day Joint Service Open House." The official theme of the open house was "U.S. Armed Forces—Strong and Ready." The Air Force promoted the event for several weeks with radio and newspaper advertisements. One news release described the occasion:

HICKAM HOSTS JOINT SERVICE OPEN HOUSE

Hickam Air Force Base, Hawaii (April 16, 1981)—The 32nd Annual Armed Forces Day Open House will be held here Saturday May 16 from 9 a.m. to 4 p.m. The theme this year is the "U.S. Armed Forces—Strong and Ready."

Top local, country and western, and military entertainment—provided by the Royal Hawaiian Band, the Aloha Airlines Musical/Hula Troupe, J.T. and The Rowdy Band, Dave West and the Chaingang, Chris Cassidy and the Rainbow Connection, the Skylarks and the Fleet Marine Force Pacific Band—will perform during the open house.

More than 30 aircraft from the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, Hawaii Army and Air National Guard, Civil Air Patrol and the Wheeler Aero Club will be on display throughout the day.

Parachute jumps by the Navy and the Marine Corps, Marine troops rappelling from helicopters, aircraft flyovers by the Hawaii Air National Guard, Air Force and the Navy are also scheduled.

Additionally, a crash/rescue demonstration by the Hickam Fire Department, a helicopter rescue demonstration by the Coast Guard and several police dog demonstrations by the Hickam Security Police will be conducted that day.

Also open that day is the annual Air Force Hawaii Youth Festival. Carnival rides, games and a midway packed with food and drinks will be the main attractions. Air Force nominees, representing the various commands at Hickam, will compete for the crown of Youth Festival Queen. The crowning ceremony will take place Friday evening at 6 p.m.

Hickam, normally a closed base, will be open to the public for the Armed Forces Day Open House.

A radio "beeper" added "Hickam's Main Gate opens at 9:00, the public is invited and it's all free!" During the open house, some parts of the base, where the normal military activities of the installation were carried on, remained closed, fenced off, and guarded.

Thousands of people entered the base on May 16 to see the displays and partake of the festivities. Included among them were James Albertini and four companions who came to protest the arms race. They gathered in the shadow of the B-52 bomber display, and unfurled a banner: "Carnival of Death." Albertini walked about, taking pictures and passing out leaflets protesting nuclear war and the proliferation of nuclear weapons. At all times, these activities were peaceful, and were confined to the area set aside for the open house.

Military Police rounded the protestors up and escorted them off the base. Albertini had previously received a "bar letter" forbidding him to reenter Hickam without the express permission of the commander.[1] He was charged therefore under 18 U.S.C. § 1382 with reentering a military installation after having been or-

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[1] On March 2, 1972, Albertini and a companion entered Hickam, ostensibly to present letters to the commander. The pair made their way into an office, and Albertini's companion poured animal blood on some secret documents found there. Both men were convicted of conspiracy to destroy government records in violation of 18 U.S.C. §§ 2, 371, & 1361. Albertini served 90 days and paid a fine of $250. He also received a bar letter forbidding him to "reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry."

dered not to reenter.[2] He was convicted in United States District Court.

DISCUSSION

Albertini contends: 1) that the open house advertisements constituted written permission for him to reenter, 2) that his actions were a constitutionally protected exercise of free speech, and 3) that the conviction on the basis of a nine year old bar letter violated due process. We reject the contention that newspaper advertisements inviting the general public fulfilled the "written permission" requirement of the bar letter. We do, however, uphold Albertini's first amendment defense. Because of our resolution of the free speech issue, we need not consider Albertini's due process contentions.

Albertini's first amendment argument rests upon the assertion that on Armed Forces Day Hickam was a "public forum" where the right to leaflet could not be unreasonably circumscribed. We face a two part inquiry here: first, whether Hickam constituted a public forum; second, where the military could exclude him from a public forum located on a military base.

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[2] 18 U.S.C. § 1382 provides:

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than $500 or imprisoned not more than six months, or both.

I. The Public Forum

Certain public places, appropriate for assembly and communication, enjoy special constitutional status as "public forums." *See generally*, L. Tribe, *American Constitutional Law*, 688-93 (1978). In a public forum, the first amendment narrowly circumscribes the government's power to exclude or regulate speech. As public places differ, however, so does the expression appropriate to them, and hence the scope of protection provided by the first amendment. Traditional settings for civic debate—streets, parks, sidewalks—always constitute public forums and receive the greatest protection. *Cary v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). Public property may also become a public forum if the state opens it for public use as a place for expressive activity. Expression then receives the same protection as in traditional forums. *Widmar v. Vincent*, 454 U.S. 263, 272-74, 102 S.Ct. 269, 275-276, 70 L.Ed.2d 440 (1981). Finally, the state may establish a "limited public forum" in which public expression is limited to certain groups or confined to particular subject matter. *Perry Education Ass'n v. Perry Local Educators' Ass'n.* ___ U.S. ___, ___, 103 S.Ct. 948, 955 n. 7, 74 L.Ed.2d 794 (1983).

A military base, even one open to the public, is not a traditional public forum. *Greer v. Spock*, 424 U.S. 828, 838, 96 S.Ct. 1211, 1217, 47 L.Ed.2d 505 (1976); *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir.1978). Albertini contends, however, that Hickam on Armed Forces Day constituted a public forum, either one where all expression was permitted, or at least one

where Albertini was permitted to counter the Air Force's own implicit message on defense policy.

We first consider whether the Air Force created a public forum by opening Hickam to the public for purposes related to expression. If the government creates such a forum, even though under no duty to do so, its power to exclude expression is severely limited. "Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 103 S.Ct. at 955. Although the government is not required to maintain indefinitely the open character of the facility, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.*

Merely permitting public access to property other than streets or parks, however, does not open the facility for use as a public forum. *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. at 1216. The place or its intended use must somehow render the facility appropriate for expression. For example, a public meeting for discussion of a pending teachers' contract clearly created a public forum (albeit a limited one) in the school property where it was held. *City of Madison Joint School District v. Wisconsin Public Employment Relations Commission*, 429 U.S. 167, 174-76, 97 S.Ct. 421, 425-426, 50 L.Ed.2d 376 (1976). A public forum may also be created when the use is less directly related to public debate. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), a theater under lease to the City of Chattanooga was found to be a public forum. Presenting plays and shows was sufficiently related to public expression that the city could

not arbitrarily exclude the musical "Hair." *Id.* at 555, 95 S.Ct. at 1245. In *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), the Supreme Court assumed without discussion that the Minnesota State Fair constituted a public forum. *Id.* at 651, 655, 101 S.Ct. at 2565-2566, 2567. The fair was intended to showcase "the agricultural, stock-breeding, horticultural, mining, mechanical, industrial, and other products and resources of the state, including proper exhibits and expositions of the arts, human skills and sciences." *Id.* at 643, 101 S.Ct. at 2561. Although the fair was not literally set aside for debate of public issues, it still was an appropriate place for expression and constituted a public forum. The state could not ban all expressive activity, although it could impose reasonable time, place and manner restrictions—such as restricting solicitation to booths. *Id.* at 655 n. 16, 101 S.Ct. at 2568 n. 16.

While these analogies are instructive, they do not deal with military bases. The government contends that the controlling decision in that regard is *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), which established that a military base is not ordinarily a public forum and held that partisan political expression could be excluded from it. Several factors distinguish *Greer* from this case, however. In *Greer*, the military facility in question was Fort Dix, which was located in a rural area and was devoted primarily to basic training. The proposed expression was face-to-face solicitation of trainees on the premises of Fort Dix. While most of Fort Dix was open to the public, military police patrolled all areas and the Army had not abandoned any claim of control over political speech on the

facility. The commander could therefore exclude political speech "to avert what he perceive[d] to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U.S. at 840, 96 S.Ct. at 1218. The prohibition was consistent with the traditional neutrality of the military in political affairs. *Id*, at 839, 96 S.Ct. at 1218.

In the present case, however, the Air Force by its publicity campaign opened up its facility to a far greater variety of activity and expression than had occurred at Fort Dix. The situation is more comparable to that in *Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972) (per curiam), a case that was distinguished but not overruled in *Greer*, 424 U.S. at 837, 96 S.Ct. at 1217. *Flower* involved leafleting on New Braunfels Avenue, a street on Fort Sam Houston that was a major San Antonio traffic artery. Access was unguarded and 15,000 vehicles per day passed by. The Court held that under "such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." 407 U.S. at 198, 92 S.Ct. at 1843.[3]

We believe that, like New Braunfels Avenue, the open portions of Hickam Air Force Base on Armed

[3] Hickam may also be analogized to a public school classroom that has been temporarily converted into a public meeting room for the school board. Under those circumstances, it seems clear that outsiders wishing to express their views on school policy would have a first amendment right to do so. See *City of Madison Joint School District v. Wisconsin Public Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). They would not have a right to do so while the schoolroom is being used for its usual educational purposes, a situation more comparable to that in *Greer*.

Forces Day were areas over which the military had effectively abandoned control of access. Indeed, the scene was perhaps closest in character to the state fairgrounds in *Heffron*, and partook of its nature as a public forum. The Air Force did much more than merely permit visitors on the base. Armed Forces Day was created especially for public participation. The Air Force went to considerable effort to publicize the event and attract visitors. Radio and newspaper advertisements highlighted the attractions of aircraft displays and demonstrations, carnival rides, bands, concessions, and a beauty pageant. If the Air Force had intended to make Hickam into a public park or fairgrounds for a day, it could have done little more. Further, the Air Force admitted in argument that one of the purposes of the activities was to present the military's view in the current arms debate, to show the public that its money is being used efficiently, that the forces are "strong and ready." The base was, temporarily, a focus of public attention concerning the role of the military in American policy. For these reasons we hold that Hickam Air Force Base was temporarily opened to the public for purposes inextricably associated with and appropriate for expression. The base therefore constituted a public forum for the duration of the day's festivities.

There are additional factors that remove this case from the rule of *Greer*, however. By far the most important is the fact that Albertini's expression, like that of the Air Force, was directed primarily toward the non-military public. There was accordingly a negligible threat to "the loyalty, discipline, or morale of troops," which was an important consideration in *Greer*. Nor was Hickam a specialized facility for the basic training

of recruits in relative isolation; any distraction provided by Armed Forces Day was of the military's own making.

Moreover, Albertini's demonstration posed no threat to the military's traditional noninvolvement in political debates. As the government conceded at argument, part of the purpose of Armed Forces Day was to convey a message to the civilian guests—that of the country's need for a "strong and ready" armed force, and the efficiency with which the Air Force fills that role. This implicit communication is not a partisan political message in the normal sense, yet undeniably it is a form of speech concerning an issue of considerable public interest today. Of course, the Air Force has every right to present this message in this way. Where the military initiates communication on a subject, however, it cannot reasonably argue that a reply will destroy the military's traditional neutrality.

Indeed, the communicative purpose of the Air Force's open house greatly strengthens Albertini's claim to access. For even if, contrary to our view, the Air Force did not create a full-fledged public forum at Hickam on Armed Forces Day, it created at the minimum a "limited public forum." "A public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board business)." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 103 S.Ct. at 955 n.7. The Air Force, in

utilizing the Armed Forces Day open house to disseminate to the public its message that defense appropriations were being wisely used, clearly established that subject matter as an appropriate one for debate. If Hickam's open house constituted only a limited public forum, Albertini's peaceful protest against the arms race was clearly within the designated subject matter. *See Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board meeting is limited public forum for school board business). And it is wholly within the purposes of the first amendment that his side of the question be presented.

Finally, the Air Force had no legitimate belief that Albertini was disrupting the Armed Forces Day activities. Normal military routine was already set in abeyance by the necessity of accommodating tens of thousands of visitors and hosting the activities of Armed Forces Day. There, amidst the aerial weapons and combat displays, the carnival rides and music and hot dog stands, Albertini quietly handed out his leaflets. We can imagine few means of expression more basic to the spirit of the first amendment and less disruptive to the Hickam open house. We are therefore compelled to conclude that Albertini's manner of expression was not basically incompatible with activity of Hickam at that particular time. *See Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

The government relies heavily on *Persons for Free Speech at SAC v. U.S. Air Force*, 675 F.2d 1010 (8th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 103 S.Ct. 579, 74 L.Ed.2d 939 (1982), which held under very simi-

lar facts that Offutt Airbase was not a public forum. In *SAC*, the majority noted that military bases have not traditionally served as places for public expression. 675 F.2d at 1015. The court then stated:

> As noted by the district court, there is no case law which supports the concept of a "temporary public forum." The Supreme Court has rested its "public forum" analysis on considerations of the historical and traditional uses of the relevant government property. [citations omitted] The question, therefore, is whether the open house is such a deviation from the historical and traditional uses of OAFB so as to create a public forum.

Id. Determining that the open house supported the military mission by improving community relations, the court concluded the open house was a traditional use that created no public forum. *Id.* at 1016-17.

With respect, we are unable to accept this analysis. The *SAC* majority addressed only the first part of the public forum doctrine: traditional use. The opinion failed to consider whether the military created a forum by temporarily opening its property to public expression. As we have seen, contrary to the assertion in *SAC*, a substantial body of case law supports the concept of a "temporary public forum." *See Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *City of Madison Joint School District of Wisconsin Public Employment Relations Commission*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975);

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). By focusing solely on whether the open house "supported the military mission" the *SAC* majority failed to address the special circumstances of the occasion and to confront the issues we find to be dispositive. We accordingly agree with the *SAC* dissent.

We conclude that members of the public had a first amendment right to hold signs and pass out leaflets at Hickam Field on Armed Forces Day. The Air Force has made no showing that the exclusion of Albertini was a reasonable time, place and manner restriction. This determination does not, however, end our inquiry: we must still consider whether the military can exclude holders of bar letters from a public forum on a military base.

II. The Bar Letter

In the interests of security, the military unquestionably has broad power to exclude persons from sensitive areas. *See Greer v. Spock*, 424 U.S. at 838, 96 S.Ct. at 1217; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961); *United States v. May*, 622 F.2d 1000, 1006 (9th Cir.), *cert. denied sub nom. Phipps v. United States*, 449 U.S. 984, 101 S.Ct. 402, 66 L.Ed.2d 247 (1980). Several decisions of the Supreme Court and of this court imply, however, that the military loses its power to exclude when a base becomes a public forum. In *Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972), the Supreme Court reversed a conviction for distributing leaflets on the public forum of New Braunfels Avenue in Fort Sam Houston. The Court stated that the "base

commandant can no more order petitioner off this street because he was distributing leaflets than could the city police order any leafleteer off any public street." *Id.* at 198, 92 S.Ct. at 1843. Flower had been given a previous bar order, and the prosecution was for illegal reentry in violation of 18 U.S.C. § 1382. *Flower* therefore controls this case. Similarly, in *United States v. Douglass*, 579 F.2d 545 (9th Cir.1978), before affirming the conviction of a bar letter holder who reentered a base, we determined that a base was not a public forum. *Id.* at 549. Clearly this step in the analysis would have been unnecessary if the military could exclude bar letter holders from a public forum. Moreover, such selective exclusion runs counter to the very notion of the public forum as a place open to all who would express their views.

We do not by our ruling deprive the military authorities of all power to exclude individuals from military installations whenever access is offered to other members of the public. Our decision is grounded in the nature of the activities at Hickam Air Force Base on the day in question, and their effect in rendering the open portions of the facility a public forum. Nor do we deal here with the exclusion of an individual whose presence constitutes a threat to the security of the military operation. The sensitive areas of Hickam were cordoned off and protected by guards. Albertini did not intrude there. His removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activity.

We conclude that Albertini's actions on Armed Forces Day were constitutionally protected. Because of our resolution of the free speech issue we need not consider Albertini's due process arguments. The conviction is REVERSED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA 82-1090

UNITED STATES OF AMERICA, APPELLEE

-vs-

JAMES V. ALBERTINI, APPELLANT

ORDER

BEFORE: CANBY, NORRIS and REINHARDT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[Filed: Jan. 4, 1984]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1090
DC CR 81-0890-01 SPK

UNITED STATES OF AMERICA, APPELLEE,

vs.

JAMES VINCENT ALBERTINI, APPELLANT.

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered July 22, 1983

OPPOSITION

BRIEF

(2)

No. 83-1624

Office - Supreme Court, U.S.
FILED
JUN 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JAMES VINCENT ALBERTINI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

During an Armed Forces Day open house to which the public was invited, Air Force authorities suppressed peaceful civilian speech aimed at other civilians by expelling five anti-arms race protesters, including respondent. He was convicted under 18 U.S.C. § 1382 for entry in violation of a bar letter issued nine years earlier.

1. Did conviction violate the First Amendment where (a) respondent's conduct was protected by the First Amendment and (b) respondent's removal and prosecution were precipitated solely by his peaceful expressive activity?

2. Did conviction exceed statutory authority or violate the Due Process Clause where (a) respondent, under all the circumstances, reasonably believed that the bar letter did not apply and (b) the bar letter of indefinite duration was issued administratively without opportunity for a hearing?

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STATEMENT OF THE CASE

This case concerns a criminal conviction for engaging in precisely the same activity -- peaceful entry onto and presence within Hickam Air Force Base during the base's annual open house on Armed Forces Day -- in which thousands of other individuals were concurrently engaged, at the public invitation of the base commander. The relevant facts, few of which are set forth in the petition for a writ of certiorari, are as follows.

On May 16, 1981, Hickam Air Force Base held its annual 32nd "Armed Forces Day Joint Service Open House." Petition for Certiorari Appendix ("Pet. App.") 1a.[1] News releases distributed by Hickam's Public Affairs Division to Honolulu's major newspapers stated:

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[1] Air Force Regulations provide that "Armed Forces Day (3rd Saturday in May) will be treated as a national holiday." AFR 190-5(2)(o)(2) (March 18, 1970).

> While Hickam is normally a closed base, the gates will be open to the public for this 32nd Annual Armed Forces Day Open House. The theme this year is "U.S. Armed Forces -- Strong and Ready."[2]

Hickam's open house was "authorized [and] encouraged" by the Air Force's own mandate to "inform the public on Air Force preparedness and promote national security ... develop public understanding of the Air Force mission ... [and] aid community relations." AF 190-5(3)(a) (March 18, 1970).[3] As petitioner concedes, the open house was held "for th[e] benefit" of the general public, not the benefit of the servicemen at the base. Pet. 3.[4]

Respondent James Albertini is a resident of Hawaii with deeply held, religiously-motivated beliefs that the military policy of the United States is unwise and immoral.[5] With four friends, Mr. Albertini openly entered Hickam's open house in the same

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[2] Excerpt of Record in the Court of Appeals (hereafter "ER") tab 8 (emphasis added). Another release stated: "Hickam, normally a closed base, will be open to the public for the Armed Forces Day Open House." ER tab 9 (emphasis added). A "Beeper" prepared for and broadcasted by local radio announced: "Hickam's main gate opens at 9:00, the public is invited and it's all free." ER tab 10 (emphasis added).

[3] The two Air Force regulations covering open houses in effect at the time were AF 190-5, entitled "Air Force Participation in Public Events", and AFM 190-9 (September 22, 1972), entitled "Information Policies and Procedures."

[4] As the public invitations indicated, the open house featured a variety of other activities designed to communicate to the public the Air Force's "theme ... United States Armed Forces — Strong and Ready," including "top local, country and western, and military entertainment," more than thirty aircraft on display for visitors to inspect (and, in some cases, enter), police dog demonstrations, aerial shows, a special "Air Force Hawaii Youth Festival" with "carnival rides, games, and a midway" for younger Hawaiians, and a competition for "Youth Festival Queen." Pet. App. 2a. The program appears to have violated regulations prohibiting turning Armed Forces Day Open Houses into "fairs [and] circuses." AFR 190-9, § 4-6(b)(4) (September 22, 1972).

[5] Mr. Albertini is a member of Catholic Action of Hawaii, and a previous litigant in this court. See Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981).

manner as the 50,000 other attendees. His purpose was

> to be involved in a peaceful legal nondisruptive demonstration of the free speech activities concerning the nuclear arms race and specifically to address Hickam's role in that, and the question of an open house where taxpayers' funds are used for this extensive display....[6]

Based on his past attendance at open houses held at Hickam and other bases, none of which had resulted in his arrest or prosecution,[7] Mr. Albertini and his companions believed, accurately, that the military's purpose at the open house was "to put across one particular aspect of concerns regarding military activity, and we felt that an alternative view ought to be expressed."[8]

The evidence is undisputed that Mr.

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[6] Transcript of Proceedings in the District Court ("T.") 57-58.

[7] T. 59, 73. These open houses were subsequent to 1972. Id.

[8] T. 58.

Albertini's presence at the Hickam open house was intended to be, and was, wholly peaceful and nondisruptive. Pet. App. 3a; see, e.g., T. 44-45, 54, 58. Mr. Albertini's own activity consisted principally of taking photographs of the displays set aside for the civilians attending the open house (T. 54), such as the B-52 whose bomb bay Hickam's authorities invited children to walk through. T. 42-43, 65-66.[9]

Talking peacefully to people approaching to chat, Mr. Albertini and his companions

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[9] Twelve photographs of the open house taken by Mr. Albertini are in the record. T. 65. In addition, Mr. Albertini's companions (but not Mr. Albertini) held a banner reading "Carnival of Death" beside the B-52, and passed out leaflets criticizing the arms race. T. 23, 43. Ironically, the B-52 had a skull and cross bones similar to that painted on the banner. T. 66. An article in the Honolulu Sunday Star-Bulletin & Advertiser, May 17, 1981, at A-10, reporting on the open house at Hickam, described it as follows: "Children turned assault amphibian personel carriers into jungle gyms, straddled torpedoes as if they were bucking broncos, blasted one another with 50-caliber machine guns and sat in the cockpit of a jet that zooms faster than Mach 2."

were on the base for approximately forty minutes before their apprehension by Major Claude Jones, Chief of Security Police at Hickam. Major Jones conceded that the arrests were prompted by the base commander's specific concern with the First Amendment activity engaged in by respondent and his companions, not with enforcement of 18 U.S.C. § 1382 or base security.[10]

As Major Jones testified, the operational order distributed to base security personnel, which contained guidelines for the open house, did not prohibit participation in such demonstrations; Mr. Albertini was not "preventing anyone from seeing the displays";

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[10] "I was summoned by the base commander to report to what appeared to be a demonstration.... [The Commander] noted to me that he had had reports that individuals were passing out leaflets and carrying anti-defense banners and that he wanted me to check into the matter and to have the individuals cease and desist from this activity." T. 17-18. See also T. 19, 22.

and he did not believe Mr. Albertini was committing any criminal act when he approached and apprehended him and his companions to get them to terminate their expressive activity at the commander's orders. T. 22-25. Nevertheless, Mr. Albertini and his companions were held at the base security office for several hours until the close of the open house (T. 70). Only after the entire group had been in custody for some time did security officials raise the issue of whether Mr. Albertini had ever received a bar letter. Id.[11]

Mr. Albertini had received a bar letter from the then-Commander of Hickam in 1972, after his conviction for conspiracy to injure government property, i.e., defacing military records concerning the Vietnam War. Unlike similar individualized letters issued in

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[11] Mr. Albertini's companions had not previously been barred from Hickam. T. 77-78.

recent years of which Mr. Albertini was aware (T. 82) -- letters were limited in duration to one or two years and containing due process clauses[12] -- the pre-printed bar letter Mr. Albertini received offered no hearing and did not specify the period for which it would apply, although from its wording it did not appear to extend past the tenure of the issuing commander in any event.[13]

Mr. Albertini believed that he could attend the 1981 open house without violating his bar letter for several independent reasons. First, the newspaper and radio ads

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[12] ER tab 7.

[13] Mr. Albertini's bar letter was not individualized, but was rather simply a previously prepared form on which his name was entered. ER tab 6. Construing the bar letter to expire with replacement of the base commander comports with the underlying theory of the personal power of a base commander to exclude civilians from a base. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). The base commander who issued Mr. Albertini's 1972 bar letter was no longer in command of Hickam in 1981.

placed by base officials specifically invited the public's attendance without exception, "and as a member of the public I felt the invitation extended to me." T. 59-60, 72-73.

Second, Mr. Albertini believed that the bar letter had long since become stale, both as a matter of law -- it seemed inconceivable that a simple letter issued without any process, in response to a misdemeanor, could have perpetual effect, especially since recent letters issued to others were sharply time-limited (T. 59, 82) -- and as a matter of fact. He had, over the years, been admitted onto Hickam on several occasions after receipt of his bar letter (without any personal written invitation from either the base commander or his delegatee) to lecture in educational extension college classes held on the base by Chaminade College as long ago as 1975-76, to attend open houses, and to conduct tours for visitors to the islands.

T. 59, 73-75.[14] In addition, Mr. Albertini had become aware that 40 percent of the main runway at Honolulu International Airport was within Hickam's boundaries, and, of course, like many travellers to Hawaii, he had himself used it. See Airport and Airway Trust Fund: Airport Safety in the Hawaiian Islands, Hearings before the Subcommittee on Oversight of the Committee on Ways and Means, 96th Cong., 1st Sess. 251-267 (1979), (testimony of James Albertini, including maps).

Third, Mr. Albertini quite reasonably

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[14] Albertini had also taught similar classes at Kaneohe Air Station some years subsequent to receiving a bar letter from that facility as well. T. 76. In addition, when Mr. Albertini entered Camp Smith in 1981, he was not prosecuted for entry in violation of a bar letter issued in 1972, or indeed even informed that he could have been. We note that his activity at that time misleadingly referred to by the government as "defacing government property" (Pet. 3) consisted of entry on Ash Wednesday, making the sign of the cross with ashes on the walls of an office on the base, reading from scripture, and singing a hymn. T. 62.

believed that a controlling decision of the local federal court precluded the government from removing an individual from a base open house for engaging in peaceful expressive activity. Mr. Albertini was aware of the decision in Butler v. United States, Civ. No. 73-3767 (D. Hawaii), a civil case brought by friends and colleagues of his, which he understood to hold that the military cannot punish or suppress peaceful civilian speech on a military base when it has opened the base by inviting the public.[15] T. 60-61.

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[15] Chief Judge King's opinion in Butler specifically held that "the Air Force Regulations ... relied on by the Defendants as authority to prevent demonstrations did not lawfully apply at Hickam Air Force Base on the day of these incidents because the Base was open to the public." Findings of Fact and Conclusions of Law (August 20, 1979), at 9. An earlier decision in Butler, foreshadowing that First Amendment ruling, is reported at 365 F. Supp. 1035 (D. Ha. 1973). The case arose from a well-publicized incident in which Hickam officials invited the public onto the base for an open house to greet President Richard Nixon and to hear the President's speech, but then forcibly expelled anti-war demonstrators. The action sought damages for the First Amendment violation and recision of bar letters issued to the expelled demonstrators.

The district court convicted Mr. Albertini after a bench trial without expressly considering the first amendment issues raised.[16] The court of appeals unanimously reversed. Expressly adhering to its prior opinions broadly construing 18 U.S.C. §1382,[17] the court acknowledged the military's need and broad power to protect itself from security risks (Pet. App. 14a):

> We do not by our ruling deprive the military authorities of all power to exclude individuals from military installations whenever access is offered to other members of the public. Our decision is grounded in the nature of the activities at Hickam Air Force Base on the day in question, and their effect in rendering the open portions of the facility a [temporary limited] public forum. Nor do we deal here with the exclusion of an individual whose presence constitutes a threat to the security of the military operation. The sensitive areas of Hickam were cordoned off and protected by guards. Albertini did not intrude there. His removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activity.

Examining the nature of the activities offered to the public at the open house, the court of appeals noted that "if the Air Force had intended to make Hickam into a public park or fairgrounds for a day, it could have done little more." Pet. App. 9a. The court also stressed that the Air Force had a "communicative purpose" in holding the open house -- namely, to present a political message to civilians, "the military's view in the current arms debate ... the country's need for a 'strong and ready' armed force and the efficiency with which the Air Force fills that role." Pet App. 9a, 10a. Carefully

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[16] T. 92-98. Those issues had been briefly addressed, prior to the presentation of evidence, in a memorandum order denying defendants' motion to dismiss the indictment. ER tab 4.

[17] United States v. May, 622 F.2d 1000 (9th Cir.), cert. denied sub nom. Phipps v. United States, 449 U.S. 984 (1980); United States v. Mowat, 582 F. 2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978); United States v. Douglass, 579 F.2d 545 (9th Cir. 1978).

weighing this case against both Greer v. Spock, 424 U.S. 828 (1976), which it noted had involved speech aimed at military personnel, and Flower v. United States, 407 U.S. 197 (1972), the court concluded that it was far closer to Flower. Accordingly, without reaching the due process and statutory issues raised, the court reversed the conviction.

REASONS WHY THE WRIT SHOULD BE DENIED

None of the considerations in this Court's Rule 17 suggests that this case warrants review. The court of appeals' careful, unanimous decision presents no conflict with holdings of any other courts. Far from conflicting with decisions of this Court, the judgment below is firmly anchored in settled doctrine. Reversal would distend Greer v. Spock to cover not only partisan speech directed at military personnel on

closed bases, but also nonpartisan speech directed at civilians attending base open houses -- civilians to whom the military is already directing its own political message. It would effectively overrule not only Flower v. United States, supra, but also Cox v. Louisiana I, 379 U.S. 536 (1965) and Cox v. Louisiana II, 379 U.S. 559 (1965).

Nor is this case important. The court of appeals adhered to its previous decisions broadly construing § 1382 to protect military interests and carefully limited its holding to the particular facts before it -- entrance in common with thousands of others who had been invited onto the base for an open house held but once a year, peacefully to listen to and comment upon a message uttered by the military on some of the most pressing public issues of the day. The court stressed that the case before it involved entry solely onto patently open parts of the base during the

open house, and no attempt to enter sections of the base which remained closed to the public.

Petitioner's suggestion that the judgment below threatens the military's open house program is belied by the dozens of bases in Ninth Circuit which continue to sponsor such open houses.

Because the unusual facts of this case establish that Mr. Albertini reasonably and correctly believed that he could lawfully participate in the open house, and therefore mandate affirmance in any event, this case is a particularly unsuitable candidate for review.

I.

IN DETERMINING THAT THE CONVICTION BELOW RESTED IMPERMISSIBLY ON THE EXERCISE OF PROTECTED ACTIVITY, THE NINTH CIRCUIT APPLIED LONG ESTABLISHED LAW

A. Conviction under 18 U.S.C. § 1382 rests upon two unpermitted entrances where the defendant was placed on specific notice after the first that the second would incur a penalty. This Court has already held in Flower v. United States, and petitioner concedes,[18] that the first entrance cannot be an element of a crime under § 1382 if it were constitutionally protected. The court of appeals properly concluded on the basis of Flower and the "long-established constitutional rule" it applied, Greer v. Spock, 424 U.S. at 835, that that same rule is applicable to the second entrance -- the

[18] Pet. 9-11. It appears doubtful that the Solicitor General's concession represents the views of the Air Force, which has issued bar letters to Mr. Albertini's companions based solely on their speech activities at the 1981 open house.

second element of a §1382 conviction -- as well. Otherwise, one would be convicted, in part, for conduct fully protected by the First Amendment.

Petitioner urges that the inquiry undertaken by the Ninth Circuit -- determining whether the second entrance and accompanying speech were protected -- was irrelevant, insisting that the mere entrance by a civilian against the order of the commanding officer (regardless of purpose or circumstances at the base that day) is conduct within the government's power to prohibit. That is not the law. If it were, this Court would not have undertaken in Greer v. Spock to determine whether Fort Dix was more like the Tallahassee jail in Adderly v. Florida, 385 U.S. 39 (1966) -- governmental property dedicated to a purpose which the state had a right to engage in without interference -- or instead like the Baton

Rouge courthouse in Cox v. Louisiana, 379 U.S. 536 (1965) (Cox I) -- governmental property which has been generally opened to the public (whether by tradition or affirmative action) and whose official uses "at a particular time" are not incompatible with the proposed "manner of expression." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

Contrary to petitioner's supposition that a governmental official could be delegated the power to exclude on pain of criminal punishment regardless of the extent to which the property had been opened to the public, this Court has repeatedly held that "the Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." Perry Education Association v. Perry Local Educators Association, 74 L. Ed. 2d

794, 805 (1983), citing Widmar v. Vincent, 454 U.S. 263 (1981), City of Madison Joint School District v. Wisconsin Public Employment Relations Commission, 429 U.S. 167 (1976), and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). The hornbook principle summarized in Perry -- "[i]f by policy or practice the [government] has opened its [property] for indiscriminate use by the general public, then ... a public forum has been created," id. at 806 -- was precisely the rule of law applied by the Ninth Circuit.[19]

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[19] Of course, the government may find it necessary or convenient to invite selected individuals or groups onto its property, or to allow limited public access during the normal military activities for which the base is established, as Hickam does regularly, and doing so is not inconsistent with continued dedication for governmental uses. See, e.g., Greer v. Spock, 424 U.S. at 831 (invitations for speeches on drug abuse and business management do not mandate general public access); Perry Education Association, 74 L. Ed. 2d at 806 (limited access of school distribution system to Cub Scouts and YMCA for communication to students does not mandate access for teacher groups seeking to communicate with employees). Where property has been opened to the public generally to the extent described [cont'd. on next pg]

As the Ninth Circuit recognized, petitioner's extended defense of § 1382 as a "neutral prohibition" is inconsistent with Flower v. United States. In Flower, this Court obviously assumed that § 1382 was constitutional on its face, but nevertheless proceeded to examine the facts of the particular entrance, concluding that the conviction could not be sustained because a

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by the Ninth Circuit here, however, the retention of power to exclude specific speakers is barred. See, e.g., Perry, 74 L. Ed. 2d at 805; Madison Joint School District, 429 U.S. at 175; Greer v. Spock, 424 U.S. at 835-837.

We do not understand the goverment to suggest that a different rule should apply to a military base, and Greer v. Spock makes clear that both that case and Flower were governed not by a special rule but rather by the "long-established" general rule.

Since the government does not contest the Ninth Circuit's conclusion that Hickam was in fact a limited public forum under this Court's cases (Pet. 8) — it argues, instead, that § 1382 rendered that analysis "of limited utility" — we will not here demonstrate why the court of appeals' conclusion on that score was clearly correct. Suffice it to say that the court of appeals properly located the open house at Hickam in Perry's second category, public property "which the state has opened for use by the public as a place for expressive activity." 74 L. Ed. 2d at 805. See Pet. App. 5a-13a.

portion of the underlying conduct was protected. Flower's approach, of course, was consistent with this Court's settled practice in First Amendment cases of examining not only whether a statute is constitutional on its face (i.e., a neutral prohibition) but also -- even if it is -- whether it is unconstitutional as applied. The teaching in countless cases[20] is that even content-neutral statutes cannot be enforced where an individual has a First Amendment right -- whether because a public forum has been created or for any other reason -- to be where he was doing what he was doing at the time in question.[21]

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[20] See, e.g., Adderly v. Florida, 385 U.S. at 46-47; Cox v. Louisiana I, 379 U.S. at 544-51; see also Bose Corporation v. Consumers Union, 52 U.S.L.W. 4213 (1984); Jenkins v. Georgia, 418 U.S. 153 (1974).

[21] The Air Force did not argue below that the exclusion of Albertini was a reasonable time, place, and manner restriction. See Pet. App. 13a. Although the government now attempts to defend its prosecution on that basis (Pet. 8-9), none of the cases it cites, or any others this Court has decided, have approved [cont'd. on next pg]

B. Petitioner's contention that Mr. Albertini's conviction does not offend the First Amendment is infected in a second way by its refusal to examine the facts surrounding his apprehension.[22] Even the broader regulation permitted where government property is dedicated for governmental purposes may not be used "to suppress expression merely because public officials oppose the speaker's view." Perry, 74 L.Ed.2d at 805; see also, e.g., Adderly v. Florida, 385 U.S. at 47, and Greer v. Spock, 424 U.S. at 838-39 & n. 11. The same rule applies a fortiorari to property generally

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time, place, or manner restrictions designed to exclude particular individuals or groups from a forum altogether. To the contrary, the very nature of time, place, and manner regulations is that they have a far less drastic effect than the rule contended for here by the government.

[22] Significantly, while stressing that § 1382 is content-neutral and that the bar letter was not based on protected activity, petitioner conspicuously avoids defending respondent's apprehension and arrest as content-neutral. See generally Pet. 7-9.

opened to the public. See, e.g., Heffron v. ISKCON, 452 U.S. 640, 648-69 (1981); Cox v. Louisiana I, 379 U.S. at 555, 558. Since the record conveniently ignored by the government squarely demonstrates that respondent and his companions were apprehended for precisely that kind of impermissible reason,[23] this case is an especially inappropriate vehicle for deciding whether even when the general public has been invited onto the base for an open house, § 1382 could be used in a content-neutral manner to exclude knowing

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[23] The court of appeals' conclusion that Mr. Albertini's "removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activities" (Pet. App. 14a) was amply supported by the government's own witness, who testified that the base commander acted not out of concern with base security, but rather to suppress the views of five of the 50,000 visitors attending the open house. See pp. 6-7, supra. The suggestion that Mr. Albertini's bar letter provided a content-neutral reason for his removal is also belied by the arrest of his four companions and the Air Force's unwarranted detention of all of them jointly until after the other 50,000 attendees had left the base and could therefore not any longer be exposed to their anti-war message. Id.

holders of existing bar letters. The court of appeals was surely correct in holding that the regulation embodied in § 1382 could not be constitutionally applied to respondent on the facts of this case.[24]

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[24] The government does not dispute "the First Amendment rights of those who attend open houses and hold unfavorable views of the military or of government." Pet. 13; see also Brief for Respondent in Opposition, People for Free Speech at SAC v. United States Air Force, No. 82-335, cert. denied, 459 U.S. 1092 (1983), at 6 n.1, 9-10 (same). Since the public generally was allowed to engage in communicative activity at the open house, id., and since the government itself was concededly communicating its own message (Pet. 12; see also Pet. App. 9a-11a), the open house cannot plausibly be analogized to a governmental speech activity which might itself be reserved for official speech without incurring an obligation to permit others to speak from the same podium at the same time as well. The Ninth Circuit's decision rested on its finding that the open house had been essentially rendered into a public park or fairground, where speech by everyone (including, but not limited to, the military) was occurring or to be expected; a case involving an attempt to interrupt a press conference by the base commander, or to seek equal access to the microphone at the President's weekly news conference, would obviously raise very different issues from those relatively straightforward issues presented by the open house in this case.

C. Petitioner's objection that the decision below "unjustifiably augments the security problems in conducting the open house program, and thus will discourage the holding of open houses" (Pet. 6) is singularly unpersuasive. Section 1382 has hardly been eviscerated; to the contrary, so far as that section is concerned, the Ninth Circuit yields to none in scrupulously considering and generously respecting the security concerns of the military. See, e.g., United States v. Douglass, supra, cited by the panel below.[25]

In the present case, the court of appeals carefully considered the government's security-based argument and found it hyperbolic. The court noted that "the

[25] In Douglass, the court of appeals affirmed a § 1382 conviction for crossing a white line to make a telephone call to summon legal assistance for persons arrested, even though the defendant had not crossed the base fence, which was on the far side of the telephone booth. See also supra n. 17.

sensitive areas of Hickam were cordoned off and protected by guards" and made clear that such closed spaces would fall under the broad rule of Greer, not the narrow exception of Flower.

Moreover, even disregarding the court's finding that Mr. Albertini was in fact apprehended and arrested because of his speech and not because he held a bar letter, the suggestion that bar letter holders generically pose security risks warranting exclusion from public forums proves far too much. For example, under §1382 the military does not, and could not, exclude individuals at one base who hold bar letters from another. Nor does the military exclude individuals from open houses or public areas who, although lacking bar letters, are believed to pose even greater threats to base security. In addition, since it is apparently current military practice to issue

bar letters which last only one or two years (see supra at 9), it is plain that the military itself believes that its security needs can be served without affording commanders the unbridled discretion to exclude those, like Mr. Albertini, whose nine-year old bar letters happen to pre-date current practice.[26]

The military, of course, is free to impose and evenhandedly apply reasonable time, place, and manner restrictions on all invitees to such of its property that, like Fort Sam Houston in Flower, or like Hickam on

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[26] Although the government points to a single base in Ninth Circuit which has reportedly, as a result of the decision below, cancelled its open house, far more significant is the fact that all the other dozens of bases in the Ninth Circuit will apparently continue to hold annual open house as usual. It would surely be surprising if the security ordinarily necessary to keep the huge and unusual influx of unknown visitors attending such open houses away from highly sensitive and dangerous facilities — in this case, upwards of 50,000 attended in 1981, and as many as 250,000 attended the open house involved in People for Free Speech, supra — were not sufficient to handle the few bar letter recipients who might also attend.

Armed Forces Day in 1981, has been opened to the public indiscriminately.[27] Finally, should any entrant compromise or threaten base security, he can be apprehended, excluded, and prosecuted under either §1382 or other statutes, including the Assimilative Crimes Act, 18 U.S.C. §§ 7 and 13.

The opinion below does not bar any of those measures. Its narrow holding is simply that §1382 may not be applied to peaceful expressive activity, as in Flower, posing no threat to base security, when undertaken in the context of a limited public forum to which, by express invitation, all have been

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[27] Indeed, it already does so, having issued detailed regulations instructing on the measures necessary to protect base security whenever bases are generally opened to the public for events like the Armed Forces Day celebration at Hickam. See Air Force Regulation 190-1 (February 16, 1982), Public Affairs Policies and Procedures, § 4-29 (Base Open House). It is noteworthy that none of the extensive security measures a base commander is instructed to undertake in connection with an open house involves or refers in any way to recipients of bar letters.

invited and encouraged to participate, and where the goverment is itself communicating its own message. That holding is correct and does not merit review.

II

THE FACTS OF THIS CASE RENDER CERTIORARI INAPPROPRIATE AND MANDATE AFFIRMANCE OF THE JUDGMENT BASED ON SETTLED DUE PROCESS PRINCIPLES IN ANY EVENT

While the court of appeals did not reach Mr. Albertini's statutory and due process arguments, the undisputed facts make clear that this case does not merit this court's discretionary review, and that the judgment reversing the conviction would have to be affirmed in any event.

For several reasons, Mr. Albertini could not be found as a matter of law to have violated § 1382. As set forth in detail supra at 1-2, 9, he reasonably believed that he had, and had in fact, received permission to enter via the newspaper and radio

invitations "to the public" to attend the open house. In addition, because his bar letter was more than nine years old, Mr. Albertini believed, and properly so, that it could not possibly still be valid.[28] The

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[28] By way of contrast, a five-year statute of limitations exists for all non-capital federal crimes, 18 U.S.C. § 3282, and a six-year limit on suits filed in the United States Claims Court, 28 U.S.C. § 2501, as amended, P.L. 164, Title I, § 139(a) (1982). Research has located no case where a conviction under § 1382 rested on a bar letter even nearly as stale as Mr. Albertini's.

Although it has been held that "intent or motive is not a component of the offense charged under the second paragraph of § 1382," Holdridge v. United States, 282 F. 2d 302, 311 (8th Cir. 1960) (Blackmun, J.), Holdridge dealt with the question whether bad motive was required — the defendant had argued that his religious objection to war justified his entry — and not with the very different issue of whether conviction can be had where a defendant reasonably believes that the bar letter is inapplicable as a matter of fact or law.

In addition to this issue of notice, or scienter, is an issue of due process. Since on the government's own analysis the exclusion of Mr. Albertini affected his liberty to exercise his First Amendment rights (Pet. 7), the Fifth Amendment requires that the deprivation be accompanied by due process, a requirement hardly satisfied here by a bar letter contended to be of lifelong effect issued without any procedures or substantive standards whatsoever. Cf. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (no due process required where no liberty or property interest affected).

staleness of the letter was also established, in Mr. Albertini's belief and in reality, by his re-entries for non-speech related reasons many times subsequent to the 1972 bar letter including to teach extension courses offered at Hickam in conjunction with base authorities, and by flying into Honolulu International Airport. See supra at 10-11. Finally, Mr. Albertini had specific knowledge of and relied on a two-year old decision of the local federal district court, holding that Air Force regulations barring demonstrations at Hickam could not lawfully be applied on the (rare) occasions when "the Base was open to the public." See supra at 10-11 & n. 15. In light of these factors, singly and together, defendant was not nearly on sufficient notice to warrant conviction under § 1382, as a matter of either that statute or of due process. Here, as in Cox

v. Louisiana II, 379 U.S. at 571, "under all the circumstances of this case, after the public officials acted as they did, to sustain [respondent's] conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State had clearly told him was available to him.'" See also United States v. Pennsylvania Industrial Chemical Corporation, 441 U.S. 655, 670-75 (1973).[29]

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[29] We note in addition, that changes in military policy concerning bar letters prevent the decision in this case from having any general effect outside a very few cases. Although bar letters issued without an offer of due process and for unstated -- arguably lifelong -- periods were once apparently common, the record indicates the more recent issuance of bar letters affording informal notice and opportunity to be heard, effective for only one or two years. See supra at 9, 22-28. Thus, future cases may not require resolution, as this one does, of the difficult questions raised by such seemingly perpetual bar letters, issued without notice, hearing, or substantive standards.

The court of appeals' First Amendment decision was correct. But even if it were not, the unusual facts of this case render it a particularly unsuitable candidate to explore the questions the government seeks to raise.

CONCLUSION

For each of the reasons outlined above, certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

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No. 83-1624

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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REPLY MEMORANDUM FOR THE UNITED STATES

Most of the Brief in Opposition is devoted to arguments that either are not relevant to this case or were explicitly not relied upon by the court of appeals. When respondent addresses the question presented by this case — whether 18 U.S.C. 1382, a content-neutral prohibition enacted by Congress, is unconstitutional as applied to a person demonstrating at a military open house — he adds nothing to the court of appeals' analysis; like the court of appeals, he takes his stand squarely on an overly expansive reading of *Flower* v. *United States*, 407 U.S. 197 (1972), even though this Court has expressly cautioned that *Flower* should be read narrowly (*Greer* v. *Spock*, 424 U.S. 828, 835-836 (1976) (quoted at Pet. 11-12)).

1.a. Respondent asserts that "the record * * * demonstrates" that he and his companions were apprehended because they were engaging in expressive activities (Br. in

Opp. 24; see *id.* at 6-7). In fact, this record demonstrates nothing of the kind. The military officials' reasons for apprehending respondent and his companions are not at issue and were never the subject of proceedings in the trial court.

Respondent's companions are not parties to this case. Respondent does not appear to have claimed below that he was selectively prosecuted for engaging in activities protected by the First Amendment, and in any event no such claim was the subject of evidentiary proceedings below.[1] Nor are there findings of fact on whether respondent and his companions were apprehended because they were engaging in protected activities.[2]

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[1]Contrary to respondent (Br. in Opp. 6), the officer who apprehended respondent specifically testified that he did so after being advised that respondent had received a bar letter (Tr. 28).

Moreover, even a showing that respondent was apprehended for impermissible reasons would not be a defense to a criminal charge. See *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (citing *Frisbie* v. *Collins*, 342 U.S. 519 (1952)). Respondent would have to show at least that his *prosecution* was improperly motivated.

[2]Respondent repeatedly asserts (Br. in Opp. 24 n.23, 27) that the court of appeals "found" that respondent's prosecution was improperly motivated. Of course, only the district court, not the court of appeals, could make such a finding of fact. But in any event, the single sentence from the court of appeals' opinion on which respondent relies ("[Respondent's] removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activity" (Pet. App. 14a)) was plainly not intended to express a view about the motivations of the officials who prosecuted respondent. Instead, it was written in support of the court of appeals' conclusion — which we do not dispute — that respondent was not entering secured areas of the base or violating any law other than Section 1382 when he was apprehended. The context makes this clear (*ibid.*):

> Nor do we deal here with the exclusion of an individual whose presence constitutes a threat to the security of the military operation. The sensitive areas of Hickam were cordoned off and protected by guards. [Respondent] did not intrude there. His removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activity.

If these issues were ever to become the subject of litigation, the military officials responsible for apprehending respondent and his companions would have an opportunity to explain their policy about such matters — although respondent appears to acknowledge that there was no policy prohibiting demonstrations (see Pet. 6) — and to give their account of why they apprehended respondent and his companions and whether they perceived the demonstration as a threat to the security or good order of the base. At least until these matters have been fully aired, respondent cannot defend a court of appeals decision declaring unconstitutional the application of an act of Congress by making assertions about the motivations of the officials who enforced the statute.

Finally, the court of appeals' decision did not rest on any conclusions about the officials' motivations. See page 2 note 2, *supra*. Instead, the court's opinion broadly holds that, notwithstanding Section 1382, a military base commander in the Ninth Circuit simply cannot enforce a bar letter against any person who enters his base during an open house for the purpose of demonstrating — even if the commander is not motivated by any hostility to demonstrations and is concerned only about the threat to the security of his base posed by proven security risks.

b. Respondent also repeatedly attempts to defend the court of appeals' decision on the ground that his first bar letter was "stale" (*e.g.*, Br. in Opp. 9, 31 & n.28). We do not dispute that a bar letter may expire after some reasonable period of time. If the court of appeals had reversed respondent's conviction because his bar letter was stale, we would be disposed to agree with respondent that the decision

would have little prospective significance. But the court of appeals explicitly declined to rest its decision on this ground (Pet. App. 15a); instead, it decided the case on the basis of a broad, and erroneous, constitutional principle.

We note in addition that even if it were determined that respondent's first bar letter had expired, his conviction might still be upheld because he was issued a second bar letter only weeks before he entered Hickam during the open house (see Tr. 62; Pet. 2-3 & n.1). The status of the second bar letter was not addressed below because the district court considered the first bar letter sufficient (Tr. 41), and the court of appeals did not overturn that ruling.

c. Respondent also asserts that, for a variety of other reasons, he believed he was entitled to reenter Hickam notwithstanding the bar letter (see Br. in Opp. 8-11). But although respondent attempts to create the impression that the military authorities countenanced his illegal reentries into the base and led him to believe that the bar letter was no longer valid (see, *e.g.*, *id.* at 33), there is no evidence that any official ever told respondent that he was free to reenter the base notwithstanding the bar letter, and respondent does not actually assert that he was ever so advised.

Instead, respondent appears to make the novel argument that by violating Section 1382 several times and escaping detection, he somehow earned immunity from prosecution (see Pet. App. 4, 9-10, 32). If respondent was unsure about the continuing validity of his bar letter, there was a natural and obvious course open to him: he could simply have asked the authorities whether the bar letter remained in effect and, if he had a justiciable claim, instituted litigation if he received an unsatisfactory answer. Not having done so,

respondent cannot now assert that he was unfairly surprised by a prosecution.[3]

2. Respondent boldly asserts that our position on the merits "is not the law" (Br. in Opp. 18). But leaving aside *Flower*, respondent does not cite a single case in which this Court has ever invalidated the application of a content-neutral prohibition like Section 1382 to persons on any public property — much less on a military installation. In fact, the case on which respondent principally relies, *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (Feb. 23, 1983), *upheld* a restriction on expression that was more nearly content-based than Section 1382 and that was applied to a forum less sensitive than a military installation.[4]

---

[3]For similar reasons, respondent cannot now assert that he was denied due process because he received no hearing on his bar letters (see Br. in Opp. 33 n.29); respondent never sought a hearing before he was prosecuted. When he was prosecuted, the district court inquired into the validity of the first bar letter (Tr. 41), and the adequacy of that inquiry is not before the Court.

[4]The other cases on which petitioner relies — *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976); and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), involved content-based restrictions on expression. See 454 U.S. at 269-270, 276, 277; 429 U.S. at 175-176; 420 U.S. at 554. Respondent also cites *Cox* v. *Louisiana* (*Cox I*), 379 U.S. 536 (1965), where one statute was struck down on gounds of vagueness and another was invalidated because it gave the authorities excessive discretion; neither of these claims can similarly be made about Section 1382. Finally, respondent cites *Cox* v. *Louisiana* (*Cox II*), 379 U.S. 559 (1965), where the court *approved* a restriction that was arguably content-based (*id.* at 562-567) and invalidated its application only because the defendants were specifically assured by the authorities that it would not be enforced against them (*id.* at 569-571). Respondent did not receive any such assurance (see page 4, *supra*).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JUNE 1984

DOJ-1984-06

SUPPLEMENTAL BRIEF

Office-Supreme Court, U.S.
FILED
SEP 14 1984
ALEXANDER L. STEVAS
CLERK

(5)

No. 83-1624

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

REX E. LEE
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Washington, D.C. 20530
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11pp

BEST AVAILABLE COPY

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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JAMES VINCENT ALBERTINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum is submitted pursuant to Rule 22.6 of the Rules of this Court to draw to the Court's attention a recent decision of the United States Court of Appeals for the Seventh Circuit pertinent to the question presented by the petition. In *United States* v. *Quilty*, No. 83-3133 (Aug. 22, 1984), a copy of which is reproduced as an appendix hereto, the court of appeals upheld the defendants' convictions on charges of entering a military installation after receipt of a bar letter, in violation of 18 U.S.C. 1382.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1984

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-3133

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHARLES J. QUILTY, FRANK FESSLER, and
LARRY A. MORLAN, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the
Central District of Illinois, Rock Island Division
No. 82 CR 40012—MICHAEL M. MIHM, *Judge*

ARGUED JUNE 6, 1984—DECIDED AUGUST 22, 1984

Before CUDAHY and ESCHBACH, *Circuit Judges*, and EDWARDS, *Circuit Judge.**

PER CURIAM. This is an appeal by three defendants who were arrested on the premises of the Rock Island Arsenal while participating in a peaceful

---

* The Honorable George Edwards, Circuit Judge of the United States Court of Appeals, Sixth Circuit, is sitting by designation.

"prayer meeting." Each defendant had been served with a "Bar Letter" after his prior participation in an anti-nuclear demonstration on the Arsenal premises.

Quilty's Bar Letter reads as follows:

> /s/ MR. CHUCK QUILTY
>
> By the authority vested in me as Commander of Rock Island Arsenal I hereby bar you from Rock Island Arsenal and order you not to reenter Rock Island Arsenal for any reason prior to 24 FEB 1983. For the purpose of this order Rock Island Arsenal includes Arsenal Island and all access thereto, except the Rock Island Arsenal Viaduct, Fort Armstrong Avenue, and the Rock Island Arsenal Bridges that connect the Arsenal with the cities of Rock Island, Illinois and Davenport, Iowa.
>
> The reason for this bar action is that on 24 FEB 1982 you engaged in a demonstration on Rock Island Arsenal in the vicinity of Building 321 in violation of Rock Island Regulation 1-19, Paragraph 1-33.
>
> You are further advised that Title 18, Section 1382 of the United States Code provides that,
>
> > "Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof . . .
> >
> > "Shall be fined not more than $500 or imprisoned not more than six months, or both."

> Should you reenter or be found on Rock Island Arsenal, as herein defined, in violation of my order, you will be subject to prosecution in the Federal Court and conviction could result in a fine or your imprisonment or both.

Bar letters received by the other appellants were of similar notice and form, except that Morlan's letter did not contain his name or the signature of an Arsenal official. Each letter, however, gave adequate notice of the consequences which might ensue upon reentry to the Arsenal, and Morlan stipulated his letter was issued by "an authorized official."

Our examination of this record does not disclose any challenge to the facts related in the paragraphs above. Nor is there any indication that appellants sought to challenge the validity of the Bar Letters before their reentry into the Rock Island Arsenal on April 10, 1982, which led to the instant prosecution.

Quilty's and Fessler's letters were dated February 24, 1982; Morlan's was dated March 5, 1982. It is undisputed that all three reentered the Arsenal on April 10, 1982. The statute upon which the government relies for this prosecution is 18 U.S.C. § 1382. It reads as follows:

> § 1382. Entering military, naval, or Coast Guard property
>
> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed there-

from or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both.

The cases were tried before a U.S. Magistrate under Rule 7 of the Rules of Procedure for the Trial of Misdemeanors Before U.S. Magistrates. The Magistrate found each guilty and sentenced Quilty to 90 days, Morlan to 45 days, and Fessler to one year of unsupervised probation and a $300 fine. On appeal to the District Judge, the convictions were affirmed.

On appeal to this court, appellants argue that their convictions violated the first and fifth amendments, that the District Court erred in not acquitting them on their defense of necessity and that the Bar Letters were procedurally invalid.[1]

The first of these claims has been resolved by the Supreme Court in *Greer v. Spock*, 424 U.S. 828 (1976). The court there said:

> A necessary concomitant of the basic function of a military installation has been "the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893. The notion that federal military reservations, like municipal streets and parks, have traditionally served as

[1] We have carefully examined the procedural arguments which appellants' counsel have advanced. We have not, however, been able to ascertain any significant error or omission in the dispatch or wording of the "bar" letters which was not cured by stipulation. Their issuance is plainly within the authority of the Arsenal command under the terms of Title 18, U.S.C. § 1382.

> a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.
>
> The respondents, therefore, had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix, and it follows that Fort Dix Regs. 210-26 and 210-27 are not constitutionally invalid on their face.

424 U.S. at 838.

The *Greer* case in footnote 10 also answers appellants' first and fifth amendment claims, and specifically the contention that their rights were violated because organized religious services were permitted by Arsenal officials on some occasions:

> [10] The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

424 U.S. at 838 n.10.

The defense of "necessity" upon which appellants also rely, has been recognized in *United States v. Bailey*, 444 U.S. 394 (1980), with two conditions: 1) the defendants must reasonably believe their crim-

inal conduct "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense," and 2) there must be no "reasonable, legal alternative to violating the law." 444 U.S. at 410. The *Bailey* opinion also contains this fuller statement:

> Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.

Id.

It is, of course, impossible to argue that nuclear war is not a more serious harm than a peaceful, if unlawful, anti-nuclear prayer demonstration [2] at the Arsenal. It is just as impossible, however, to argue that there are not reasonable alternatives to violating the law under which these defendants were convicted. There are thousands of opportunities for the propagation of the anti-nuclear message: in the nation's electoral process; by speech on public streets, in parks, in auditoriums, in churches and lecture halls; and by the release of information to the media, to name only a few. *United States v. Bailey* authoritatively answers appellants' third argument in this appeal, inasmuch as "a reasonable, legal alternative to violating the law" clearly existed. *Id.*

---

[2] Reciting the prayer of St. Francis is certainly not an "anti-nuclear demonstration" under all circumstances and at all times. When spoken on the premises of a federal nuclear arsenal by persons who have been officially barred from the property as a result of a prior demonstration, this characterization is, we believe, appropriate.

Appellants cite to us and rely upon *Commonwealth of Pennsylvania v. Berrigan*, No. 1959 Philadelphia, 1981 (Pa. Super. Feb. 17, 1984) (en banc), and *Kiiskila v. Nichols*, 433 F.2d 745 (7th Cir. 1970) (en banc). *See also Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972).

The first of these cases was tried in the state courts of Pennsylvania and, on appeal, resulted in a remand for new trial by the majority of the Superior Court of Pennsylvania, Philadelphia Office. The majority opinion cited *United States v. Bailey*, *supra*, quoted substantially different justification defenses provided by Pennsylvania law, 18 Pa. C.S. §§ 501 and 503, and held that *United States v. Bailey* "while instructive" was "not binding on our understanding of Pennsylvania's defense of justification." Slip Op. at 7.

While we accept the Pennsylvania Superior Court's interpretation of Pennsylvania law, and recognize that *Bailey* may not be binding on that court, we cannot disclaim its authority over the United States Courts of Appeals.

We have also considered the *Kiiskila* cases cited above, to the extent they instruct a different formulation on the first amendment question. These cases were decided in the early 1970's, well before the Supreme Court's decision in *Greer v. Spock*, *supra*. The federal necessity defense was defined in 1980 in *United States v. Bailey*, *supra*. As indicated above, we are required to regard the majority opinions in the *Spock* and *Bailey* cases as established law, which this Circuit must now follow.

We recognize that appellants may well view themselves as inheritors of a tradition of civil disobedience which historically has encompassed American politi-

cal dissent from Thomas Paine to Henry David Thoreau to Martin Luther King, Jr. It would be hard to argue that appellants' cause—apparently a general effort to stop nuclear war—is not comparable in significance to those which motivated these just named figures in their respective causes. Further, there is nothing in this record to show that their conduct was in any respect violent or disruptive. These considerations, however, do not alter the duty of the federal courts to enforce the laws established by a Congress elected by the people, under interpretations which the Supreme Court has upheld as consistent with the United States Constitution.

The convictions are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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JOINT

APPENDIX

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(6)

No. 83-1624

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1984
CERTIORARI GRANTED DECEMBER 3, 1984

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* The opinion of the court of appeals is printed in the appendix to the petition for writ of certiorari and has not been reproduced.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES— ALBERTINI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DATE	PROCEEDINGS
1981	
July 1	Information filed
Sept. 22	Arraignment waived—plea of not guilty entered.
Oct. 16	Motion to dismiss indictment and memorandum in support of the motion filed
Nov. 13	Motion to dismiss denied
Dec. 9	Non-jury trial
Dec. 10	Decision by the court—defendant found guilty
1982	
Feb. 16	Sentencing—three months in jail, notice of appeal filed

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

JAMES VINCENT ALBERTINI
No. 82-1090

DATE	FILINGS—PROCEEDINGS
1982	
Feb. 24	Docketed case and entered appearances of counsel
Oct. 22	Argued and submitted before: Canby, Norris and Reinhardt, JJ
1983	
July 22	Filed opinion—reversed judgment of conviction
July 22	Filed and entered judgment
1984	
Jan. 4	Filed order denying petition for rehearing and suggestion for rehearing en banc
Jan. 12	Mandate issued

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Cr. No. 81-890
18 USC 1382
[Filed: Jul 1, 1981]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES VINCENT ALBERTINI, DEFENDANT

INFORMATION

The United States Attorney Charges:

On or about 16 May 1981, James V. Albertini did unlawfully and knowingly within the jurisdiction of the United States in the District of Hawaii reenter and was found within a military reservation, to wit: Hickam Air Force Base in Honolulu County, Hawaii, after the said James V. Albertini had previously been ordered not to reenter by an officer in command and in charge of said military reservation in violation of title 18, U.S. Code, Section 1382.

Dated: 23 June 1981, at Honolulu, Hawaii.

WALLACE WEATHERWAX
United States Attorney
District of Hawaii

By: H. Ray Starling
H. RAY STARLING, CAPT, USAF
Special Assistant
United States Attorney

[2] * * * * *

BEA BOKEN

was called as a witness by the plaintiff, after being duly sworn, testified as follows:

THE CLERK: Will you state your name, your address and spell your last name.

THE WITNESS: Ms. Bea Boken, B-o-k-e-n, 1529 Molina, [3] M-o-l-i-n-a, Honolulu, 96818.

DIRECT EXAMINATION

Questions by Mr. Starling:

Q. Thank you. Mrs. Boken, do you work?

A. Yes.

Q. Could you tell us where you work?

A. I work as a secretary for the chief of Security Police at Hickam Air force Base.

Q. And how long have you been in that position?

A. About ten years now.

Q. What kinds of duties do you have as secretary to the Chief of the Security Police?

A. Well, I monitor paperwork and review paperwork, schedule meetings and I also maintain security police records, including records on bar letters.

Q. Okay. Do you actually keep the bar letters themselves?

A. Yes, I have a file.

Q. Okay. Are you familiar with the routine processing of these bar letters at Hickam?

A. Yes.

Q. Could you tell the court briefly what that process is?

A. Well, at the time of any incident—a little more serious incident—

[4] THE COURT: Well, whenever a bar letter is issued, you don't make that determination, do you?

THE WITNESS: No. No, Your Honor.

THE COURT: When it's issued what happens?

THE WITNESS: It's up to the base commander to determine whether he wants to issue a bar letter to anyone involved in an incident, and that he signs the bar letter and

it's given to the security policeman on duty to present to the individual that has been detained.

Q. (BY MR. STARLING): Okay. And once it has been presented, what happens?

A. Then it is forwarded to me, put in my files.

Q. Okay.

THE COURT: And a copy is?

THE WITNESS: A copy of the letter, yes, sir.

Q. (BY MR. STARLING): Okay. And what kind of an notation, if any, do you have on the bar letter to show that it has been issued?

A. In this case it's presented to the individual by a security policeman that's on duty and he certifies that it has been presented—the original copy has been presented to the individual that's being barred.

MR. STARLING: Thank you. Mr. Clerk, could you hand Prosecution Exhibit No. 1—I'm sorry—Plaintiff's Exhibit No. 1 to the witness?

[5] THE CLERK: (Complying).

Q. (BY MR. STARLING): Mrs. Boken, could you take a look at Plaintiff's Exhibit No. 1 and tell me if you can identify that exhibit?

A. Yes. That's a copy of the bar letter that I maintain in my files.

Q. Okay. Would you tell us once again who is the custodian of the records from which that document was drawn?

A. I am.

Q. Okay. Is that the document that came from your files?

A. It's a copy of the document, yes.

Q. Is it an exact copy?

A. It's an exact copy.

Q. And who made that copy?

A. I did.

THE COURT: Who put this writing on here: Anti-war demonstrator?

THE WITNESS: That's my writing from back in 1973.

THE COURT: You mean you put that on there after it came to you?

THE WITNESS: Yes, Your Honor.

THE COURT: That wasn't on there when it was handed to anybody?

THE WITNESS: No. No, Your Honor.

[6] Q. (BY MR. STARLING): Are these bar letters, such as the one you have in your hand, maintained by you in the regular course of your duties as secretary to the security police?

A. Yes, they are.

* * * * *

[13] **DIRECT EXAMINATION**

Questions by Mr. Starling:

Q. Mr. Shishido, where do you work?

A. I'm a special agent with the FBI.

Q. And how long have you been in that position?

A. Since 1965.

Q. And generally what are your duties as—

[14] A. To investigate violations of federal law.

Q. Did you have occasion to investigate the criminal destruction of certain military documents which occurred on Hickam Air Force Base on March 2, 1977?

A. Yes, I have.

Q. Did you or did the FBI make an arrest in that case?

A. Yes.

Q. Could you tell us who was arrested in that case?

A. There were three defendants in that case—

THE COURT: Well, was Mr. Albertini one of them?

THE WITNESS: Yes. James Albertini was one of them.

THE COURT: Yes. Go ahead. That's the defendant in this case?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

Q. (BY MR. STARLING): Could you tell the Court—

MR. STARLING: And, Your Honor, I realize that some of this may be redundant, but for the record I would like—

THE COURT: Well, it really doesn't make any difference what he was arrested for or what he was convicted of. He was issued a bar letter, right?

MR. STARLING: Yes.

THE COURT: He could have been issued a bar letter for chewing gum in the wrong place.

MR. STARLING: Your Honor, I perceive that on the [15] record it's not going to be clear as to who exactly got the bar letter.

THE COURT: Go ahead.

Q. (BY MR. STARLING): Okay. Mr. Shishido, what was the outcome of the case involving—

THE COURT: If you know.

Q. —The incident on March 2nd, 1972?

A. Following the incident on March 2nd, . . .

Q. Yes.

A. . . . Well, James Albertini along with two others were brought to trial in federal district court and convicted of—

MR. TRECKER: Your Honor, we would object on the grounds that this—the witness is obviously testifying from hearsay at this point.

THE COURT: I'll take judicial notice of the fact that I tried the case and they were convicted of misdemeanors, weren't they?

THE WITNESS: Yes.

THE COURT: Yes. Value under a hundred dollars.

Q. (BY MR. STARLING): Now the Mr. Albertini—

THE COURT: By me and a jury. Go ahead.

MR. STARLING: Your Honor,—

Q. (BY MR. STARLING): The Mr. Albertini that was tried and convicted in that case for the incident on March 2nd, 1972 at Hickam Air Force Base, do you see that Mr. James V. [16] Albertini in the courtroom today?

A. Yes, sir; I do.

Q. Could you point to him, please, and call him by name?

A. Yes, sir. That's James Albertini in the light sport coat at the defense table.

MR. STARLING: Let the record reflect a proper identification, please.

THE COURT: The record may so show.

MR. STARLING: I have no further questions.

THE COURT: Any questions of Mr. Shishido?

MR. TRECKER: No questions.

THE COURT: Thank you, sir.

* * * * *

THE CLERK: State your name, your address and spell your last name.

THE WITNESS: Name is Claude Jones. I'm chief of security police at Hickam. I live on Hickam Air Force Base. Last name is spelled J-o-n-e-s.

DIRECT EXAMINATION

Questions by Mr. Starling:

[17] Q. Major Jones, could you tell the Court how long you have been the Chief of Security Police at Hickam Air Force Base?

A. Approximately seven months.

Q. Generally, what do your duties include?

A. I'm the Chief of Security Police at Hickam and my responsibilities are law enforcement and security on Hickam Air Force Base.

Q. Okay. Directing your attention to the 16th of May of 1981, did you have occasion to be present at an armed forces day open house at Hickam on that day?

A. I did.

Q. Could you tell the Court what, if any, involvement you had with a group of demonstrators on base that day?

A. At approximately 1300 or 1 o'clock p.m. I was summoned by the base commander to report to what appeared to be a demonstration near one of the aircraft displays. There were individuals involved with carrying a banner and individuals involved in passing out leaflets.

THE COURT: On the base?

THE WITNESS: On the base; yes, sir.

Q. (BY MR. STARLING). Okay. What, if anything, did you do when you arrived at that area?

A. I conferred with the installation commander in the beginning and he noted to me that he had had reports that [18] individuals were passing out leaflets and carrying anti-defense banners and that he wanted me to check into the matter and to have the individuals cease and desist from this activity.

Q. And what did you—if anything did you proceed to do after you received those instructions?

A. I first contacted two individuals who were carrying a banner near the right wing of the B-52 that was on display at the open house and asked the individuals to please put the banner away, to continue to enjoy the exhibit, but we asked them to put the banner away. Those individuals then proceeded to walk toward the display entry on Hickam Air force Base.

Q. Okay.

A. I then—

Q. What happened next?

A. I then briefed the installation commander on that activity and at this point he said he'd also received reports that there were other individuals passing out leaflets and that he did not want this activity going on during the open house activity.

Q. Did he tell you anything in particular about the persons passing out leaflets?

A. He said that reports that had come to him were that one of the individuals, a Mr. James Albertini—

[19] MR. TRECKER: Objection, hearsay, Your Honor.

MR. STARLING: Your Honor, it's not offered for the truth of the matter asserted. It's merely offered to show what was said to Major Jones which led him to other acts.

THE COURT: Well, I'll allow it for that purpose.

Q. (BY MR. STARLING): Yes. Please—

THE COURT: Briefly, briefly.

THE WITNESS: All right. At that point I then began to search for the individuals that were in fact passing out leaflets and did come upon two individuals that were in fact in possession of leaflets at that time.

Q. (BY MR. STARLING): Okay. Let me back up just a moment. Could you tell us: Did you know anybody by the name of James Albertini at that time?

A. No, I did not.

Q. Did the base commander explain to you who James Albertini was or why that was significant?

A. He had mentioned it because he said that the individual had been barred from the installation at Hickam—

Q. Okay.

A. —for previous activities.

Q. Okay. Could you proceed and tell us what you did next?

THE COURT: You mean he mentioned the name Albertini to you?

[20] THE WITNESS: Yes, sir; he did.

Q. (BY MR. STARLING): Had you ever heard the name Albertini before?

A. Not before that day, I had not. I was relatively new at that time.

Q. And how long had you been the security police commander at that time?

THE COURT: Seven months.

THE WITNESS: No, sir; that's seven months today. I was approximately chief of police a week at that time.

THE COURT: Oh.

MR. STARLING: Thank you.

Q. (BY MR. STARLING): Would you proceed to tell us what next transpired?

A. All right. I approached two individuals from the back. One individual was carrying leaflets. The other individual was carrying nothing. I had reasons to believe that one of them may be Albertini, and I addressed him saying: Mr. Albertini, at which time—

THE COURT: And you were—how were you positioned at the time that you—

THE WITNESS: I was behind the two gentleman at that time. I was approaching them from the rear. They were walking away from me.

Q. (BY MR. STARLING): Okay. And what happened?

[21] A. At that point in time one of the gentlemen turned around and I asked the individual for identification. Addressed—I told him who I was and asked for his identification. He produced the identification and it was a Hawaiian driver's license with the name James Albertini on it.

MR. TRECKER: Your Honor, before the witness continues, we would object to the admissibility of this evidence on the ground that it's inadmissible under the case of Brown vs. Texas, 443 U.S. 47.

THE COURT: Overruled. Go ahead.

Q. (BY MR. STARLING): You were presented with an ID card?

A. That is correct.

Q. And what—

THE COURT: He said a driver's license.

MR. STARLING: I'm sorry.

THE WITNESS: Yes, sir. It was identification, Hawaiian driver's license. It had Mr. Albertini's picture and his name on it: James V. Albertini.

Q. (BY MR. STARLING): Okay. Do you see the individual who presented you with that driver's license in the courtroom today?

A. Yes, sir. he is—

Q. Could you point to him and call him by name?

A. He's seated at the defense table, the gentleman in [22] the light jacket and the yellow shirt.

Q. Do you know his name?

A. Mr. James Albertini.

MR. STARLING: Let the record reflect the proper identification of the defendant—

THE COURT: It may.

MR. STARLING:—by the witness.

Thank you very much. I have no further questions.

THE COURT: Cross-examine.

CROSS EXAMINATION

Questions by Mr. Trecker:

Q. Major Jones, when you talked to the base commander and he told you that he didn't want these individu-

als passing out leaflets, did he say why he didn't want them passing out leaflets?

A. He felt that it was not in the best interest of the installation, that he did not—these had not been approved by him to be passed out. These individuals were not to be passing these sort of things out.

Q. And was—at the time that you approached Mr. Albertini and asked for his identification, was he committing any criminal act that you knew of?

A. No. Mr. Albertini and the other gentleman were walking side by side—

THE COURT: You mean any other criminal act.

[23] MR. TRECKER: Well, I'm not so certain that that is a criminal act.

THE COURT: Being on the base?

MR. TRECKER: Being on the base.

THE COURT: That's what he's being tried for, isn't it?

Q. (BY MR. TRECKER): Anyhow, at the time that you approached him from the rear and asked for his identification, was he being—was he preventing any of the people there from observing the displays or had he done that prior to that time?

A. Not that I knew of, and, no, he wasn't preventing anyone from seeing the displays.

THE COURT: Was he the one that was carrying the leaflets or was the other fellow?

THE WITNESS: The other gentleman was, sir. Mr. Albertini had no leaflets in his hands that I could see.

THE COURT: He had nothing. He had nothing in his hands?

THE WITNESS: No, sir. Not that I could see.

THE COURT: Very well.

* * * * *

[25] CROSS EXAMINATION

Q. (BY MR. TRECKER): And in that operational order is there any mention of directive or otherwise to the security police forces to prevent people from participating in demonstrations?

A. Not in this operations order; no, sir.

* * * * *

[27] Q. (BY MR. TRECKER): Do you know whether or not they were subsequently removed from the base from either observing that or otherwise?

THE WITNESS: Yes, sir. They were—

THE COURT: They were removed from the base?

THE WITNESS: Yes, sir, at approximately 1630 that afternoon.

THE COURT: That was reported to you?

THE WITNESS: Yes, sir, it was reported to me. It's a matter of official record.

THE COURT: And you wanted to know, of course, whether they had been. That's your job.

THE WITNESS: Yes, sir. That's right.

THE COURT: Are these patrol law enforcement people under your control?

THE WITNESS: Yes, sir, they are.

THE COURT: The people he turned them over with are under his control, so if you want to ask him some more questions about that, you may.

Q. (BY MR. TRECKER): And how many individuals did you [28] turn them over to, first of all? How many security policemen were there?

THE COURT: Patrol—

THE WITNESS: I can't answer that. I—

THE COURT: More than one?

THE WITNESS: Yes, sir. It would have been more than one.

Q. (BY MR. TRECKER): Now, sir, did you participate in the preparation of an incident or complaint report in this case?

A. Not personally; no, sir.

Q. Did you review it after it was prepared?

A. I have seen it. I think it's the one you're talking about.

Q. And it is my understanding that it is your testimony today that you—before you approached Mr. Albertini from the rear, you knew from your conversation with the base commander that one of the individuals in the group was suspected to have been a person who had been barred, is that correct?

A. That is correct. Yes, sir.

Q. And you only approached two people, is that correct?

A. I approached the first group carrying the banner near the B-52—

Q. All right.

A. —and then I approached Mr. Albertini and the other [29] individual—

Q. Okay. At the time you approached the first group and you saw three people, did you know if any of those three were Mr. Albertini at that time?

A. I had no reason to believe the people carrying the banner were Mr. Albertini at that time; no, sir.

Q. And why was that?

A. There was no indication from my commander that those people were in fact—one of those people were in fact Mr. Albertini.

Q. Okay. Well, you hadn't watched—isn't it true that there was a group of five people there that day who were together—the ones carrying the banner and the ones distributing leaflets?

A. I personally know of two groups of two and that's the two that I am referring to at this time.

Q. Okay. Had you previously seen those people together in one location aboard the open house at the base?

A. No, I had not personally, sir.

Q. Okay. And so when you approached the group of two people from behind—

THE COURT: Which ones?

Q. (BY MR. TRECKER): The second group?

A. Yes, sir.

Q. You didn't know which of those two people was Mr. [30] Albertini, correct?

A. No, sir; I did not.

Q. Okay. And—

MR. TRECKER: Your Honor, I have a marked up copy of this. I'd like to have it marked as Exhibit—

THE COURT: Marked as Exhibit 4 for identification.

THE CLERK: Yes.

THE COURT: Is this the incident report?

MR. TRECKER: Yes, it is, Your Honor.

THE CLERK: Yes.

Q. (BY MR. TRECKER): Sir, would you briefly look at Pages 1 and 2 of the incident report and tell us: Do you see any mention on the incident report of any communication by the base commander to yourself or anyone else saying that the base commander believed that one of the people who was conducting the activity that you disagreed with was Mr. Albertini or had been previously barred? Do you see any mention in the incident report ever anything to that effect?

A. (Perusing document) No, sir, it is not so noted.

Q. And you had reviewed this incident report again before it was finally submitted, is that correct?

A. Would you restate your question, sir?

Q. You reviewed the incident record carefully before it was finally submitted?

A. By finally submitted, what do you mean?

[31] Q. Before you signed off on it?

THE COURT: To whom is that incident report made?

THE WITNESS: In this case we forward it to our base judge advocate, sir.

THE COURT: Did you have to sign it to forward it?

THE WITNESS: One of my representatives signs it, sir.

THE COURT:; You didn't sign it?

THE WITNESS: I do not sign it personally, sir.

THE COURT: You didn't sign this one?

THE WITNESS: No, sir; I did not. This is signed by my chief of administration and reports.

Q. (BY MR. TRECKER): But, you read the report before it was forwarded?

A. Yes, sir; I did.

MR. TRECKER: Okay. We would offer Defendant's Exhibit 4 into evidence, Your Honor.

THE COURT: What for?

MR. TRECKER: To impeach the testimony of the witness regarding the contact by the base commander indicating that—

THE COURT: He didn't make the report.

MR. TRECKER: Pardon me?

THE COURT: He didn't make the report.

MR. TRECKER: No, but he reviewed the report and our [32] contention is, Your Honor, that an important point like that would have been included in the report or would have been inserted by his direction into the report.

THE COURT: What's important about the point?

MR. TRECKER: Because if the base commander and the security police people did not know ahead of time that there was a person who had been previously barred, it goes to our assertions as to whether or not the evidence of Mr. Albertini being aboard the base is admissible.

THE COURT: It's important to you, not to him.

MR. TRECKER: Yes.

THE COURT: You have any objection to the incident report? None?

(No response)

THE COURT: It's in evidence.

MR. TRECKER: We have no further questions, Your Honor.

* * * * *

[34] **RECROSS EXAMINATION**

Questions by Mr. Trecker:

Q. Just a couple of questions. Sir, do you know [35] whether or not—well, strike that.

Had you seen the leaflet in question and read it before you stopped Mr. Albertini and asked for his identification?

A. No, sir; I had not.

Q. Do you know whether or not the base commander had seen the leaflet before that time?

A. I cannot say on his behalf. No, sir.

THE COURT: But, he knew the leaflets were being passed out?

THE WITNESS: Yes, sir; he did

THE COURT: But, you don't know whether he read it or not?

THE WITNESS: No, sir; I do not.

Q. (BY MR. TRECKER): So, as far as you know, the base commander didn't know whether this leaflet says: Air

Force, you're doing a great job, keep up the good work or what it really did say?

A. I cannot say on that point, sir.

Q. Okay. Now was everybody who was in possession of a leaflet that day arrested or were only these five people arrested?

THE COURT: Everybody in possession?

MR. TRECKER: In possession of a leaflet.

THE COURT: You mean who were passing it out. I [36] suppose a lot of people got some.

MR. TRECKER: That's what I'm talking about. Did the people who got it, received it, who might have had possession of it, were they arrested also?

A. The ones that received it?

Q. Yes.

THE COURT: Well, we haven't gotten the evidence that Mr. Albertini was arrested, yet.

MR. TRECKER: Well—

THE COURT: Was he arrested?

THE WITNESS: No, sir. There was no arrest, no apprehension.

MR. TRECKER: I think, Your Honor, under the case law—

THE COURT: You can argue about it, but he said he didn't arrest him. Now you can argue that what he did was an arrest, but he did not arrest him in his mind. You may disagree with him, but—

Q. (BY MR. TRECKER): Were all of the people who had possession of the leaflet that day, whether they were distributing it or had ahold of it, or were passing it on to other people after they had received it or otherwise—were they all removed from the base that day?

A. You're saying: Were the base population that had been handed this leaflet and had retained—

[37] THE COURT: That's right.

MR. TRECKER: That's right.

THE WITNESS: No.

Q. (BY MR. TRECKER) So, only those five people were stopped—

A. That were distributing—

Q. — and removed from the base?
A. That we found; yes, sir.
MR. TRECKER: No further questions, Your Honor.
THE COURT: Anything else?
MR. STARLING: No further questions and no further

* * * * *

[42] **DIRECT EXAMINATION OF WALLACE INGLIS**

Questions by Mr. Trecker:

Q. Mr. Inglis, do you know the Defendant James Albertini?

A. I do.

Q. And can you tell us: Were you with him on the date of 16 May 1981?

A. I was with him and three other individuals; yes, sir.

Q. Aboard Hickam Air Force Base?

A. Yes.

Q. And can you briefly tell us what you were doing there?

A. We went there to make a statement, really. The Air Force had kindly opened the base that day to the public and we went to make a statement about two things. First of all, the day itself: That we thought it somewhat inappropriate that the day be celebrated by allowing children to walk through the [43] bomb bay of a B-52, as if it were some kind of a Disneyland attraction, and so our first statement then was on the banner that we held underneath the wings of that B-52, and the banner read: Carnival of death. Quite appropriate.

The second statement was what that bomber symbolized. That it symbolized the wider arms race that's engulfing the world, and we wanted to make a statement about that, too, and that was on our leaflet that we passed out.

Q. Okay. You have mentioned a leaflet. Could I have the leaflet shown to the witness, please?

THE COURT: Exhibit?
THE CLERK: (Complying) Six.
THE COURT: Defendant's 6.
THE WITNESS: Yes. This is the leaflet.

MR. STARLING: Your Honor, I'd like to object to all of this line of questioning and evidence that's being produced. It's not relevant. The reason why Mr. Albertini was on base is absolutely not relevant at all.

THE COURT: Well, you say it isn't, he says it is; so, he's permitted to make his defense. I'll overrule the objection.

Q. (BY MR. TRECKER): Would you tell us—

THE COURT: Go ahead.

Q. (BY MR. TRECKER):—is Defendant's Exhibit C a copy of—

[44] THE COURT: That—

MR. TRECKER: Pardon me.

Q. (BY MR. TRECKER): Defendant's Exhibit 6 a copy of one of the leaflets that was distributed that day?

A. This is a copy of the leaflet we distributed, yes.

Q. All right. Now—

THE COURT: What was five, by the way?
THE CLERK: Five is an article.
THE COURT: It hasn't been offered yet?
THE CLERK: No.
THE COURT: All right. Go ahead.

Q. (BY MR. TRECKER): Were you, Mr. Inglis, aware through the newspapers of any publicity concerning an open house that day?

A. Yes. That's how we discovered that the base was indeed opened to the public, yes.

MR. TRECKER: Okay. And could I have Defendant's Exhibit 5 shown to the witness?

THE CLERK: (Complying).

THE WITNESS: This would be one of the newspaper invitations, yes. This was one that we saw before we went there. yes, sir.

Q. (BY MR. TRECKER): All right. Now a few other questions. When you got to Hickam were you ever at any point in time engaged in any activity which you believed to be [45] criminal?

A. Not at all. No, what we did was very much in the spirit of the day. It was very quiet, low key. It was a festive atmosphere and we made no attempt to disrupt.

Q. Did you make any speeches?
A. No, we made no speeches.
Q. Did anybody else in the group make any speeches?
A. No.
Q. Did you do anything other than hold the banner and distribute leaflets, and walk around?
A. That's about it, right.
Q. Now is that also true for Mr. Albertini as far as your observations of him?
A. As far as I know. I was not with Mr. Albertini through most of the demonstration, but—
THE COURT: Were you with the banner?
THE WITNESS: I was.
Q. (BY MR. TRECKER): All right. And would you tell us just briefly—would you tell us when it was that you were detained and taken from the area, if you were?
A. I can only guess at the time. I would say probably about 40 to 45 minutes after we had begun our demonstration we were removed.
Q. And where were you at the time you were detained?
A. We were in the parking lot. There had been some [45] discussion when we first were approached. It was not Major Jones, by the way, that approached us. He may have been in the group that gathered around us, but the first officer I believe was a public relations officer or something, and he asked us our purpose and we had a rather lengthy conversation about what we were doing there and why—
THE COURT: Mr. Albertini was not in that group?
THE WITNESS: He was not in that group, no. And so, finally, then we decided to have a procession around the perimeter of the exhibit area and we made it quite clear, I think, to the patrol that gathered around us and by the time we got to the parking lot it was quite a group and it was a regular procession. There were probably two of us and about a dozen, maybe, military, nonmilitary people walking in our little procession.
Q. (BY MR. TRECKER): And what were you doing at the time in the parking lot when you were detained and taken to the security police station?

A. We had already rolled up the banner and put it in a pickup truck and made it quite clear that our demonstration had ended and we were about to leave voluntarily.
THE COURT: This didn't include Mr. Albertini?
THE WITNESS: He was not with us at the time.
Q. (BY MR. TRECKER): Okay. And can you tell us, Mr. Inglis, whether or not you were taken directly from the [47] parking lot to—
THE COURT: Now are you going to go into all that happened to Mr. Inglis?
MR. TRECKER: No, just one other question along this line to tie it up with Mr. Albertini.
THE COURT: All right. Go ahead.
Q. (BY MR. TRECKER): You were taken directly from the parking lot to the security police station, is that correct?
A. That's correct.
Q. Did you arrive there before Mr. Albertini arrived there?
A. It was more or less simultaneous. You know, we came in different vehicles, but I think that we were there briefly before Mr. Albertini was brought in, yes.
Q. Okay. And, finally, were you aware at the time that you went to Hickam Air Force Base on that day of the decision of Judge King in the case of Butler vs. United States?
A. I was.
Q. Do you have any knowledge—do you know whether or not that decision was discussed among the group before you went there?
A. It was.
MR. TRECKER: No further questions, Your Honor.

* * * * *

[47] SETSU OKUBO

was called as a witness by the plaintiff, after being duly sworn, testified as follows:
THE CLERK: Will you state your name, your address and spell your last name.
Five and six are in?
THE COURT: Yes. Five and six are in over objection.

THE WITNESS: I'm Setsu Okubo, spelled o-k-u-b-o, [49] first name S-e-t-s-u, and I live at 1266 Matlock Avenue.

DIRECT EXAMINATION

Questions by Mr. Trecker:

Q. Now, Setsu—

THE COURT: Mrs. Okubo, please.

THE WITNESS: Miss Okubo.

THE COURT: Miss Okubo.

THE WITNESS: Miss Okubo

Q. (BY MR. TRECKER): Mrs. Okubo—

THE COURT: Miss, she said.

MR. TRECKER: Yes.

Q. (BY MR. TRECKER): Could you tell us, do you know the defendant James Albertini?

A. Oh, yes, I've known James for a long time, many years.

Q. And were you with him on May 16th, 1981 at Hickam Air Force Base?

A. Yes, we were. We went on the same pickup truck.

Q. And would you tell us what you were doing during the time you were there? Were you carrying a banner or were you distributing leaflets or both or—

A. Well, I had nothing to do with the leaflets. I'd made the banner—and, by the way, I'd like to have the banner back because I'll be needing it soon.

THE COURT: Well, take it up with somebody else. [50] That's not the place—we're not a depository for lost articles. Just confine yourself to the questions.

THE WITNESS: I made the banner.

THE COURT: Next question. Is there a question pending?

MR. TRECKER: Yes, there is, Your Honor.

Q. (BY MR. TRECKER): And what—

THE COURT: What's the question?

Q. (BY MR. TRECKER): You were not distributing leaflets then. You were holding the banner?

A. Holding the banner was, yeah, enough for me.

THE COURT: That's all you have to say: Yes or no.

Q. (BY MR. TRECKER): Okay. And would you tell us the circumstances under which you were detained or taken from the scene? Were you told that you were committing a crime at the time or what was done at the time you were detained?

A. I was detained at the station, you mean?

THE COURT: I guess what he's trying to say is: Who said what to you when you were detained? Did anybody say anything to you, and, if so, who was it and what did he say?

THE WITNESS: Oh, when I—you know, there was some officers—not officers, but these are just guys in fatigues, and they said: Get off the base. So, yeah, we were marching, so we said, we'll go to the—we're going off. We went to the parking lot. I got up on the pickup truck in the back [51] because the front part was locked, and then somebody came and told us that the base commander wanted to see us and so we had to go by car to the base—whatever that station is.

Q. (BY MR. TRECKER): And, subsequently, you were removed from the base or escorted off the base, is that correct?

A. Escorted off the base?

Q. Or told to leave?

A. From the field?

Q. No, after you got to the security police station.

THE COURT: How did you get off the base? Did you walk off, drive off?

THE WITNESS: No, they brought—they told us to get into two squad cars or whatever, and they said: If I didn't get on willingly they were going to bodily carry me, so I got on.

Q. (BY MR. TRECKER): Okay. Now was Mr.—

THE COURT: In other words, you were escorted off the base.

THE WITNESS: Yeah.

THE COURT: Very well.

THE WITNESS: Not the whole base.

THE COURT: Go ahead. Next question.

Q. (BY MR. TRECKER): Was Mr. Albertini with you at the truck when you were detained?

[52]A. No, he wasn't. We got off.

Q. Was there any mention to you or anyone else in the group while you were there that any member of the group was believed to be—

A. Not at all.

Q. . . . believed to have been previously barred from the base?

A. No.

Q. Now, were you aware of Judge King's decision in Butler vs. United States prior to going to Hickam that day?

A. Oh, yes, I'm very familiar with Dr. Willis Butler's case.

Q. And did you know—in fact know the defendant in the Butler case?

A. Oh, yes.

Q. Now can you tell—

THE COURT: That would be the plaintiff.

MR. TRECKER: Plaintiff, yes.

Q. (BY MR. TRECKER): Can you tell us whether or not the question of the Butler decision was discussed among the group, including Mr. Albertini, before you went to Hickam that day?

A. Yes. We'd had meetings—I mean, the group met regularly to discuss our protest the nuclear build up.

Q. And was one of the things that was discussed before [53] going to Hickam—

A. Oh, yes.

Q. —the Butler decision—

A. Uh-huh.

Q. —and the open house nature of it?

A. Yes.

Q. And did you, ma'am, see any of the newspaper articles advertising the open house that day that have been Defense Exhibit 5 for identification is—represents?

A. Yeah, I read a number of them.

MR. TRECKER: Okay. Could I have the witness, just for the records, see Defense Exhibit 5.

THE COURT: Here—oh, five, yes.

THE CLERK: (Complying).

Q. (BY MR. TRECKER): Could you tell us whether or not any of those articles were the articles—

THE COURT: Well, five is the one article. Three is the one—is the whole bunch of them.

MR. TRECKER: I think there are two on five, Your Honor.

THE COURT: Are there two in five?

MR. TRECKER: Two different articles on five.

THE COURT: Two articles.

MR. TRECKER: Perhaps three.

THE COURT: Well, how many?

[54] THE WITNESS: Well, I subscribe to both papers and I knew we were going to go there, so I looked at all of these—

THE COURT: Well, how many are there in Exhibit 5?

THE WITNESS: In this one here? There are three.

THE COURT: Well, hand it to the Clerk. If you don't know I'll count them myself. Hand them to me.

MR. TRECKER: There appears to be three different articles, Your Honor

THE WITNESS: Three.

THE COURT: Three articles on one piece of paper.

Q. (BY MR. TRECKER): One final question, Mrs. Okubo—Miss Okubo: Can you tell us whether or not you saw Mr. Albertini engaged during the time that he was aboard Hickam Air Force Base on May 16th, 1981 in any kind of disruptive or otherwise criminal activity that you knew of?

A. Oh, all I saw Mr. Albertini do was to take photographs. He was the one with the camera and none of us had any so I just saw him taking photographs everywhere. That's all.

MR. TRECKER: No further questions, Your Honor.

THE COURT: Any further questions of Ms. Okubo?

MR. STARLING: Yes.

CROSS EXAMINATION

Questions by Mr. Starling:

Q. Mrs. Okubo—

[55] THE COURT: Miss.

Q. (BY MR. STARLING): Miss Okubo, I'm sorry. Do you know Mr. Albertini very well?

A. Oh, yes, I do.

Q. Did you know that he had been barred back in 1972 from coming onto Hickam Air Force Base?

A. Yes, I know about that incident. I know about—what is it—I know about subsequent cases, too.

Q. How did you know about that?

A. Oh, because I've been associated with Mr. Albertini, and all of us, in the antinuclear race—I mean—group, and we've discussed these things very thoroughly many, many times.

Q. So, you knew that Mr. Albertini had been barred from Hickam Air Force Base?

A. Yes. That was a long time ago. About—uh-huh.

Q. Because he told you?

A. Well, it was public knowledge at that time. I think it came out in the papers a lot.

Q. Did you ever hear him deny that he had been barred from Hickam Air Force Base?

A. No, all of us knew about it.

Q. The Butler case, could you tell us what Judge King's ruling was?

THE COURT: Oh, my. I don't want to hear her tell me what it is.

[55] MR. STARLING: She seems intimately familiar with it.

THE COURT: Well, she can tell us what she thinks it said.

THE WITNESS: Sure, I'd be willing to say that.

THE COURT: Well, I should hope you would.

THE WITNESS: Yeah, I thought—I thought it was a great—what shall I say—

Q. (BY MR. STARLING): Just what was the ruling, please?

A. That we may express our opinions and our ideas as any American has a right to do in public.

Q. Thank you.

A. And that was an open house public day affair.

THE COURT: Any other questions of Miss Okubo?

MR. STARLING: Thank you, Your Honor.

MR. TRECKER: No, Your Honor.

MR. STARLING: No further questions.

THE COURT: Thank you, ma'am. You may step down.

THE WITNESS: Thank you.

(Witness excused)

MR. TRECKER: We would next call Mr. Albertini to the stand, Your Honor.

THE COURT: Mr. Albertini.

JAMES V. ALBERTINI

was called as a witness by the plaintiff, after being duly sworn, testified as follows;

[57] THE CLERK: State your name and your address.

THE WITNESS: My name is Jim Albertini, reside at 1918 University Avenue, Honolulu, 96822.

DIRECT EXAMINATION

Questions by Mr. Trecker:

Q. Mr. Albertini, were you present aboard Hickam Air Force Base on 16 May 1981?

A. I was.

Q. And first question that I have for you is, you heard the testimony of Major Jones earlier. Do you ever recall Major Jones approaching you from the rear and calling your name, Mr. Albertini, and you turning around to address him prior to you identifying yourself?

A. I remember Major Jones' face. I don't remember my name being asked of Mr. Albertini.

Q. Were you asked for identification?

A. I do recall that.

THE COURT: Did he approach you from the rear?

THE WITNESS: I have no recollection of how he approached me.

Q. (BY MR. TRECKER): Can you tell us, sir, first of all, why were you aboard Hickam Air Force Base on that day?

A. As pretty much the other witnesses have said on my defense, I went to Hickam to be involved in a peaceful legal [58] nondisruptive demonstration of the free speech activities concerning the nuclear arms race and, specifically, to

address Hickam's role in that, and the question of an open house where taxpayers' funds are used for this extensive display to put across to the public one particular aspect of concerns regarding military activity, and we felt that an alternative view ought to be expressed.

Q. All right. And did any of your activities aboard the base that day constitute anything other than being peaceful and nondisruptive?

A. Certainly not in my judgment and I haven't heard that from anyone.

Q. Now you had—it is true you had received a bar letter in 1972, is that correct?

A. That's correct.

Q. A bar letter from Hickam?

A. March 2nd, 1972.

Q. All right. And—

THE COURT: That's the only one you ever received?

THE WITNESS: That's the only bar letter I've ever received from Hickam.

Q. (BY MR. TRECKER): Now have—a few questions along that line.

THE COURT: Yeah, I meant from Hickam.

Q. (BY MR. TRECKER): Did you believe that bar letter [59] in your mind at the time you went to Hickam on 16 May 1981 to still be effective?

A. No, not—for several reasons.

Q. And what are those reasons?

A. No. 1 would be the fact that on May 16th, 1981 Hickam was announced to be an open house, and the public was invited, and as a member of the public I felt that invitation extended to me. No. 2, the bar letter was issued in 1972, nearly 10 years ago, and it seems a very unreasonable length of time for a bar letter to remain in effect for even what the government considers a misdemeanor offense of resistance to the Viet Nam war when the maximum penalty is six months in prison and a $500 fine. In effect to have a bar letter in effect for ten years constitutes a parole period that far exceeds any reasonableness. And other reasons as well: I have been to Hickam Air Force Base on several occasions since 1972. I've been to other open houses, I've lectured in educational classes, I've helped to conduct a tour for visitors to the islands, and as well I've been to other bases since receiving barring letters without any—

THE COURT: You mean other bar letters.

THE WITNESS: Any other bar letters, yes.

THE COURT: You have been to other bases from which you had other bar letters.

THE WITNESS: That is correct.

[60] Q. (BY MR. TRECKER): Let me go back a second. You mentioned that one of the reasons you thought the bar letter was not effective was because there was an open house and the public was invited.

MR. TRECKER: Could I have the witness shown Exhibit No. 5, please, Your Honor?

THE CLERK: (Complying).

Q. (BY MR. TRECKER): Can you tell us whether or not you have seen the articles shown on Exhibit 5 prior to 16 May 1981?

A. That's correct. I read them all.

Q. This is—you read them prior to 16 May?

A. That's correct.

Q. And what conclusions did you draw from the articles?

A. The conclusion, as stated very explicitly, it is an open house activity and that the public is invited, and that I, as a member of the public, am invited. And even aside for a moment the question of the bar letter, I was aware of the Butler decision that said when—in my judgment it said that when the military opens its base to the public they cannot segregate out the kind of free speech—peaceable free speech activity that takes place, so I felt the Butler case established a right for us to be there to peaceably hand out our information.

Q Just to clarify that point, if I may interrupt for a second, were you aware of the Butler decision and the holding in Butler prior to 16 May 1981?

A. That's correct. I would say that Dr. Butler and the defendants involved—the plaintiffs involved in that case are personal acquaintances and friends that I've known for some time.

Q. And what did you—just to make sure that we're clear on the record, what did you understand the Butler case to hold or rule as far as your activities on 16 May?

A. As I've stated that when the military opens its bases up to the public the military cannot deny the right of the public to exercise free speech according to the First Amendment. It cannot segregate the kind of public activity that takes place on Hickam.

Q. Okay. At the time that this incident took place in May of 1981, were you aware of any other bar letters from Hickam or other bases which place time limits on the period for which the person was barred?

A. Let me respond to that by saying: I received—I've received several bar letters over the years from a number of military bases here in Hawaii and a similar bar letter received in 1972 was from Camp H. M. Smith, and that bar letter—the wording of it was perhaps exact or nearly as exact as the Hickam behalf letter of '72 in that it had no specified time period involved nor a due process clause, as [62] more recent bar letters do have. They have specified time periods of one to two years as well as a due process clause that if you feel the bar letter is not reasonable you have a chance to respond in writing to the base in question.

This past March—March of '81, I and eight others went on to Camp Smith for a rather serious clear-cut case of nonviolent several disobedience. It was Ash Wednesday of the Christian calendar and we were able to enter the Nuclear War Policy and Plans Office of the headquarters building at Camp Smith and make the sign of the cross with ashes on the walls of that room, read from scripture and pray and sang a hymn, and for that particular action no prosecution on the civil disobedience action was taken by the military nor was there any movement to enforce the barring letter from 1972 from Camp Smith.

THE COURT: Did you get a new bar letter?

THE WITNESS: Never received a new bar letter.

THE COURT: Have you got one of those more recent bar letters that have the due process clause and so forth?

THE WITNESS: I believe I do in my file.

THE COURT: Well—

THE WITNESS: Would you like to see them, Judge?

THE COURT: Well, you take it up with your lawyer, but I think—

MR. TRECKER: Yes, We would like to offer one of [63] those, Your Honor, but—

Q. (BY MR. TRECKER): So, let me make sure I understand your testimony. Your testimony is that despite the fact that you were barred from Camp Smith in 1972 when you reentered Smith in 1981, you were not prosecuted for—

THE COURT: Entry—

Q. (BY MR. TRECKER): —having been previously barred for . . .

A. For reentry.

Q. . . . trespassing, correct?

A. Yes. The reason I state that is because that simply added to the Butler case to the actual open house activity to the reasons why we felt our going to Hickam on May 16th this year was a legal right or—

THE COURT: In your mind.

THE WITNESS: In our mind: Legal right on the Butler case and that the bar letters was no longer in question since it was such a lengthy period of time.

THE COURT: I'm informed by my law clerk that a copy of the more recent bar letter is attached to the motion to dismiss.

MR. TRECHER: That's correct. And we would ask that that be made a record at this trial as Defense Exhibit 7.

THE COURT: Well, you can get to that when you get to it. Let's finish the witness and then you can make that [64] motion.

Q. (BY MR. TRECKER): Now, Mr. Albertini, can you tell us the circumstances under which you were stopped and detained on that day?

A. I think I could best do that through the use of the slides—just a few slides that I took that day on May 16th.

THE COURT: What are you going to prove now?

MR. TRECKER: The circumstances under which he was stopped and detained, Your Honor.

THE COURT: Very well. These are slides you took yourself?

MR. TRECKER: That's correct.

THE COURT: And they correctly show what happened?

THE WITNESS: That's correct.

THE COURT: You may proceed. Are they marked for identification?

MR. TRECKER: With the Court's permission, we have the slide projector set up and Mr. Albertini—

THE COURT: How many of them are there?

MR. TRECKER: There is approximately—

THE WITNESS: Ten or fifteen.

MR. TRECKER: There's about 12.

THE COURT: You are offering them in evidence?

MR. TRECKER: What we'd like to do, Your Honor—

THE COURT: You can't show them and take them away.

[65] MR. TRECKER: Yes. What we'd like to do is substitute with the Court's permission prints of the slides into the record.

THE COURT: Well, have you got them yet?

MR. TRECKER: No, we don't.

THE WITNESS: We can substitute or submit the slides—

THE COURT: Well, you can work that out with the Clerk later. Meanwhile, you put them in evidence. Go ahead.

(Off-the-record discussion)

THE COURT: I can see it.

Q. (BY MR. TRECKER): Could you explain what this slide represents Mr. Albertini?

A. This slide is one of the first ones I did take that day. It's when we arrived at Hickam, the five of us—

THE COURT: Well, briefly, Mr. Albertini.

THE WITNESS: Yes. We first walked around the various activities. There were—there was rock music, country music playing, Ferris wheels, candy cotton—

THE COURT: Please, very briefly.

THE WITNESS: Yeah. ... and various aircraft on display. So, I took just a few shots of an overview of the various displays, as shown here.

THE COURT: Types of aircraft.

THE WITNESS: Right. Various types of aircraft. And the public being invited to get up and sit in the cockpits [66] and being given descriptions and lectures by the personnel involved. We chose, as a place for—it may have to be darkened a little more, but—we chose as a place for our particular demonstration the immediate area of the B-52 bomber after observing the overall display. (Indicating) And here—it can be darkened a little more—is Miss Okubo and Wally Inglis holding the banner which was set up approximately 1 o'clock.

THE COURT: How big a banner is that? About—

THE WITNESS: Oh, it's six feet—

THE COURT: Six by four?

THE WITNESS: Six by four, approximately.

THE COURT: All right.

THE WITNESS: Yes. And again, the description: Carnival of death, end the arms race. And the interesting thing about our banner being in the decor of the day, it had had a picture of skeletons—bones and skulls, and the bomber that we were standing under had a skull and cross bones painted on the big bomber up as an insignia. We felt we were right in tune. Here various military people coming up to simply chat, and, as you can see, I'm away from the immediate area of the banner just taking photos. The two other people with us are in the immediate vicinity handing out fliers.

Q. (BY MR. TRECKER): Just to stop it there for a second, did you take all of these photographs yourself?

[67] A. Yes I've taken all of these.

MR. STARLING: Your Honor, I'd like to object to this whole line of testimony and evidence. It's not relevant to the defense. I can't believe Mr. Trecker believes that this is—

THE COURT: Well, he can make his record for reasons of defense. I'll rule on it afterwards.

MR. TRECKER: I think it's—
THE COURT: You may proceed.
THE WITNESS: I think it's relevant in a sense that—
THE COURT: You may proceed. Don't argue it, Mr. Albertini.
THE WITNESS: One point of showing this is that—
THE COURT: Don't argue it. Just go ahead with them.
Q. (BY MR. TRECKER): Could you describe this slide, Mr. Albertini?
THE COURT: Briefly, I can see it.
Q. (BY MR. TRECKER): This is a very clear picture of the banner?
THE COURT: Yes—
THE WITNESS: Showing us peacefully demonstrating.
Q. (BY MR. TRECKER): Who are the people in there?
THE WITNESS: Setsu Okubo on our left and Wally Inglis on the right.
THE COURT: All right.
[68] THE WITNESS: This is Ron Rimkowsky (Phonetic) handling out one of our leaflets. So, after this demonstration was going on for half an hour, 40 minutes—I'll end this up, we only have two or three more slides—then the custody situation took place, and I can explain that without the use of the slides what happened.
THE COURT: You want to give the slides to the clerk so he can mark them—put them in an envelope and mark them as exhibits. And if you want to borrow them and make prints, why, take it up with the Clerk later on.
Next question.
THE WITNESS: Here
How do you turn this off?
THE COURT: In the back.
THE WITNESS: (Complying).
Q. (BY MR. TRECKER): And what happened when you were stopped and asked for your identification?
A. As I was saying, after about 30 or 40 minutes of taking photos, the group handing out leaflets and holding the banner, Nathan Hirada and I decided to get some refreshments, so we walked away from the [s]ite of the B-52 to the

refreshment stand and purchased a Coca-cola or something. On our return to the B-52 display we noticed that Ron Rimkowsky, Wally Inglis and Setsu Okubo had gone. We didn't know where, so we in turn started walking around looking for them. We've since [69] found out that it was at that point where they had decided to do a procession of the perimeter of the display area and were in fact back at the parking lot when they were taken into custody—
Q. Let me stop you there for a second and ask you: Up to the point in time that you left to go to go get a coke, your slides have shown you taking pictures of the banner and distribution of leaflets in that area and that Air Force personnel were around you. Did anyone tell you that they felt that you were engaging in an unlawful activity at that time?
A. No. No one informed—
Q. Did anyone ever come up to you and tell you that what you were doing was inappropriate or that the base commander had determined that he didn't want to see it happen?
A. Not at all.
Q. Okay. And then would you explain what happened upon your detention and removal from the area?
A. To continue, Nathan and I were walking around looking for the other three members of our group when I was approached by several military officers or enlisted men and asked for identification and did produce a driver's license and they said that we're being taken into custody—
THE COURT: Well, who did the talking for the officers? Major Jones?
THE WITNESS: I believe it was Major Jones.
[70] THE COURT: When you say they, they didn't all talk at once, did they?
THE WITNESS: As Major Jones correctly said: He was in the group that initially approached us and then we were turned over to other military people, taken into custody.
Q. (BY MR. TRECKER): Okay. And were you subsequently removed from the base?

A. We were kept into custody for several hours until I was finally released well after the open house exhibit was closed for the day.

Q. (BY MR. TRECKER): Now at the time that Major Jones approached you and asked for your identification, in fact, from that time forward up until the time you actually were physically taken to the security police station did Major Jones or anyone else tell you that they believed that you were illegally aboard the base because you had been previously barred?

A. No, not at all to my recollection. It was only in the base security office after I would say an hour or so that the issue of a bar letter came up.

Q. And how did that come up?

A. As I recall, it was a Sergeant Hatcher, whose name is listed in one of the government exhibits—the report of the incident—he was the one doing the questioning and somehow said that you have a bar letter, I see, according to [71] our records.

Q. Do you know how he determined that you had been barred?

A. I have no idea.

MR. TRECKER: No further questions, Your Honor.

THE COURT: Any questions?

MR. STARLING: Yes, Your Honor.

CROSS EXAMINATION

Questions by Mr. Starling:

Q. Mr. Albertini, I believe it was your testimony that you did receive a bar letter in 1972 telling you not to come back onto Hickam Air Force Base?

A. That's correct for anti-Viet Nam war activities.

Q. Do you recall that it said that you could not come back onto Hickam Air Force Base without the written permission of the commander?

A. Or an officer designated by him.

THE COURT: Well, you have a Defendant's Exhibit 1 for identification. Is that in evidence, by the way?

THE CLERK: No, it isn't. It isn't.

THE COURT: If you want to use that one—

MR. STARLING: Well, I could use that one or—

THE COURT: That's the one he said he got.

MR. STARLING: Yes. Could you—

THE CLERK: Sure.

[72] THE COURT: That his lawyer said he got.

Q. (BY MR. STARLING): Is Defendant's Exhibit 2 for identification—

THE COURT: One.

Q. (BY MR. STARLING): . . . one for identification, is that the letter that you received or a copy thereof?

A. Yes. This would be the letter.

THE COURT: You offering it? Are you offering it?

MR. STARLING: I have no objection to the defense offering that particular—

THE COURT: You don't want to offer his letter?

MR. STARLING: (Negative nod).

THE COURT: Okay. Go ahead.

MR. STARLING: Okay, Your Honor, I'll offer Defense Exhibit No. 1.

THE COURT: It's in evidence.

Q. (BY MR. STARLING): Referring to Defense Exhibit No. 1, Mr. Albertini, do you agree that it does indicate that you cannot come onto Hickam Air Force Base without the written permission of the commander—

THE COURT: I think Mr. Albertini will agree that he understands English and can read it.

THE WITNESS: Yeah. And I should add to that: My understanding of that is that the open house activities and the newspaper reports announcing the open house activities [73] constituted in fact written permission to enter that base.

Q. (BY MR. STARLING): You really believe that?

A. Of course I do.

THE COURT: Don't argue with him. Don't argue with him.

THE WITNESS: There's nothing in that news announcement to exclude me as an unacceptable member of the public.

Q. (BY MR. STARLING): Yes. Now—

THE COURT: Well, your group discussed that beforehand, as a matter of fact.

THE WITNESS: That's correct, with the Butler case.

Q. (BY MR. STARLING): Now—

THE COURT: I should never write such long opinions. Go ahead.

Q. (BY MR. STARLING):—regarding the other times which you have been onto Hickam to lecture and do others things, you've been onto Hickam, you say, during times when you say there was no open house since your bar letter?

A. I've been on Hickam both at times when there have been other open house activities, as well as times when I have been invited by military personnel on the base, both to give lectures in educational classes and—

Q. Have you ever been invited by an officer designated by the commander to issue a permit for your reentry?

[74] A. Well, I would assume—

THE COURT: If you know.

THE WITNESS: I would assume that anyone who is part of the Air Force that extends an invitation has the authority to do so. That's between that person and—

THE COURT: Give me a for instance that you went down there at the invitation of somebody on the base to give a lecture.

THE WITNESS: That's correct. That's the instance.

THE COURT: Yeah, give me a for instance. When?

THE WITNESS: I would think—I've been on a couple times in the years probably '75 and '76.

THE COURT: Back in seventy-five and six?

THE WITNESS: Seventy-six, yeah. Roughly in that time frame.

THE COURT: What kind of a group was it? To whom did you—

THE WITNESS: College class.

THE COURT: Run by—was it an extension sort of course?

THE WITNESS: Yes. That's correct.

THE COURT: Run by whom, University of Hawaii or—

THE WITNESS: Chaminade College.

THE COURT: Chaminade.

THE WITNESS: Yeah.

[75] THE COURT: And run on the Hickam base?

THE WITNESS: That's correct.

THE COURT: Who actually got you to go out there, the Chaminade faculty people?

THE WITNESS: That's correct.

Q. (BY MR. STARLING): How about your entries onto other military bases after you received your bar letters? Some of those—

THE COURT: Well, he mentioned one.

THE WITNESS: Yeah. Well, I had other instances, for example, Kaneohe Marine Corps Air Station, I'm barred as well or was barred and I've also given—

THE COURT: Have you collected one from each base yet?

THE WITNESS: Pretty much, and that represents about 25 percent of this Island.

THE COURT: Well, I was just wondering if you were working at it.

THE WITNESS: The military appears to be working at it.

THE COURT: Go ahead.

Q. (BY MR. STARLING): And during these times when you have reentered other military bases in violation of bar letters, were you invited on by the commander or someone representing the commander?

[75] A. Well, there are different cases. In, for example, Kaneohe I have given lectures in educational classes there similar to the Hickam—

THE COURT: Was that Chaminade also?

THE WITNESS: I believe it was. I'm not sure if that was, but similar extension classes. But, in other cases like the Camp Smith activity, clearly, there was no invitation given by the base commander, so—

Q. (BY MR. STARLING): So, in effect you really don't care too much about getting bar letters?

A. Well—

THE COURT: Well, that's kind of argumentative, counselor.

MR. STARLING: Well, I'm trying to make a point, Your Honor—

THE WITNESS: I would say this. I'll respond to the question—

Q. (BY MR. STARLING): You didn't consider the bar letter as being any real bar to you on May 16th.

A. I'm sorry?

Q. Isn't it true that the conversation you had with your group concerning the May 16th incident and Judge King's decision in the Butler case was oriented and directed toward whether the Air Force could remove demonstrators and not in the least directed to whether it would effect you and your bar [77] letter, isn't that correct?

A. I think all of the circumstances were discussed—the ramifications. We don't enter into any actions lightly, but we clearly saw that May 16th activity—our activity there as a legal expression of free speech, asserted in the Butler case, and that the—from past experiences and given the light of ten-year old bar letters that it wouldn't be in effect.

THE COURT: Well, if everybody is going to talk about the Butler case, I guess I can, too. As I recall the Butler case there were no bar letters—

MR. STARLING: That's correct, Your Honor.

THE COURT: —at the time of the taking of the people into, quote, custody, unquote, and removal from the base. There were bar letters issued subsequently.

MR. STARLING: That's correct, Your Honor.

THE COURT: But, I don't recall that there were any before the people went on the base.

THE WITNESS: Uh-huh.

THE COURT: Go ahead, counselor.

THE WITNESS: The relevance I think in this particular case to the Butler case, none of the other four—

THE COURT: Was the open house bit that you were arguing about.

THE WITNESS: Yes. And then the other four [78] participants have never received bar letters from Hickam, yet they were taken into custody as well.

THE COURT: Yes. Well, go ahead, counselor.

MR. STARLING: No further questions, Your Honor.

THE COURT: Anything else of Mr. Albertini?

MR. TRECKER: No redirect, Your Honor.

THE COURT: Thank you, sir.

* * * * *

[94] THE CLERK: Criminal 81-890, United States of America vs. James Albertini. This hearing go called for decision by the Court.

THE COURT: I see you made it, Mr. Trecker.

MR. TRECKER: Yes, Your Honor. They canceled my case. Fortunately they dropped the charges against my client, a benefit to everybody.

THE COURT: Scared them out of it, huh?

Well, the reason I wanted to put this over to today is I wanted to read some of these cases that have come down in this area which more or less tell me what I have to do.

For example, in the Douglass case up in—I'll find it—the State of Washington, one of the arguments there had to do with the fact that there was no limit on the bar letter. It also had to do with controlling speech on a military base. They held the statute that is involved here was not vague for ambiguity, that he wasn't protected by the First Amendment in what he was doing, and that the fact that there was no limit on his bar letter was not fatal to the fact that it existed. That's United States vs. Douglas, 579 F.2d 545. That's Mr. Albertini's friend, Mr. Douglass, who was here at the time they went down to Hickam a different time.

[95] Then in United States vs. Mowat, 582 F.2d 1194, that's also—this one is out of Hawaii also—I mean, Douglass started in Hawaii, but he got up in Bremerton. This one came out of Hawaii. There's a specific section of the opinion dealing with specific intent, and it says that the statute does not require specific intent. That was written by Judge Cummings, an old classmate of mine from Yale.

In that case it's pointed out that you do need some intent, but the intent is only to go on the base, not specific intent to violate the law to ignore anything. Just the intent that's present in intentionally and voluntarily and knowingly entering the base and not stepping across a line unwittingly, that one wasn't aware that he was on a base. So, that takes care of that problem.

And then Butler vs. United States was mentioned by the defense as one of the reasons why he thought he was entitled to go on there, but, of course, I read that very care-

fully again—I'd forgotten what I'd said before—and I don't see anything in there that covers that point at all. The statute has two parts—13—what's the number again? Thirteen eighty-two?

MR. STARLING: That's correct, Your Honor.

THE COURT: Thirteen eighty-two has two parts—the first part covers people who enter on any military base for any purpose prohibited by law or lawful regulation. That's [95] not this case. The second paragraph is: Whoever reenters after having been ordered not to reenter. That's this case. And the Butler case, that came under the first paragraph as to whether they—they were never charged with anything. The question was whether or not the military authorities were acting pursuant to law in saying that in taking them into custody and throwing them off the base on the assumption that they had entered for a purpose prohibited by law or lawful regulation, and then there was a civil suit for damages by those that had been thrown off, and I held that they had not entered for a purpose prohibited by law or lawful regulation, but that the authorities who tried to—who ejected them could put up a defense that they had a reasonable basis for believing that they had that authority. As I recall, that was when President Nixon was landing here and wasn't the Premiere of Japan coming right after him or something like that?

MR. TRECKER: (Affirmative nod).

THE COURT: And we got involved in all kinds of special regulations about security for visiting heads of state and all that short of thing. So, while I held that the military had—did not have —well, put it the other way around. If those parties had been charged criminally I would have discharged them because they were definitely invited by the President of the United States to come there. None of them had a bar letter. In this case we have an entirely different proposition, and the statute doesn't make any exemption for public invitations and so forth. So, as I see the law, there is no question that—that Mr. Albertini was on the base knowingly after he'd received a bar letter which was in effect.

* * * * *

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS [illegible] AIR BASE WING (PACAF)
APO SAN FRANCISCO 96553

ATTN OF: SP

SUBJ: Order Not To Enter or Reenter Military Reservation

TO: James V. Albertini
29-30 Humana Rd., Honolulu

EXHIBIT 1 Civil No. 71-0090

1. You are being removed as a trespasser from Hickam Air Force Base, a military reservation, and ordered not to reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry.

2. Your attention is invited to 18 U.S.C. 1382, entitled: Entering Military, Naval or Coast Guard Property, which states:

> "Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station or installation after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof shall be fined not more than $500 or imprisoned not more than six months or both. June 25, 1948 - C.645, 62 Stat. 765."

ERNEST W. PATE, Colonel, USAF
Commander

I certify that on 2 Mar 72 the original of this letter was given to the addressee.

(Signature of Person Who Delivered the Letter)

BEST AVAILABLE COPY

4-5-60 lm

OPEN HOUSE AT HICKAM FEATURES TOP MUSICAL ENTERTAINMENT

Hickam Air Force Base, Hawaii (May 11, 1981) -- Hawaiian, country and western and, of course, military bands will entertain visitors to Hickam Air Force Base Saturday. The occasion is the 1981 Armed Forces Day Joint Service Open House which runs from 9 a.m. to 4 p.m.

The Royal Hawaiian Band will get things going at 9 a.m. when the gates open. The Aloha Airlines Musical Troupe takes over at 10 a.m.

Country and western dominates from 11:30 a.m. until 2 p.m. with J. T. and the Rowdy Band, Londie Mason and the Country Shadows, and Chris Cassidy and the Rainbow Connection.

-more-

EXHIBIT "A"

BEST AVAILABLE COPY

4-5-60

At 3 p.m. the Hickam Skylarks, an acappella chorus, will perform, with the Fleet Marine Force Pacific Band closing the show beginning at 3:30 p.m.

While Hickam is normally a closed base, the gates will be open to the public for this 32nd Annual Armed Forces Day Open House. The theme this year is "U.S. Armed Forces--Strong and Ready."

RELEASE NUMBER: 4-5-60	NEWS RELEASE DISTRIBUTION RECORD	MEDIA COUNT: 2

RELEASE TITLE: Open House Entertainment

NEWSPAPERS

STORY	PHOTO	ADDRESSEE	STORY	PHOTO	ADDRESSEE
X	X	Honolulu Advertiser			Air Force Times
X	X	Honolulu Star-Bulletin			Federal Times
		Military Sun-Press			Pacific Stars & Stripes
		Pacific Business News			Caduceus
		Bid Service Weekly			Hawaii Army Weekly
		Building Industry Digest			Hawaii Marine
		Hawaii Hochi			Navy News
		Hawaii Times			Pointer
		United China Press			Tradewinds
		New China Daily Press			Tropic Lightning News
		Garden Island News (Kauai)			Pacific Reservist
		Hawaii Tribune-Herald (Hilo)			Patrol
					PAC-FACTS
		Hawaiian Falcon			Weekend Warrior

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News Release

United States Air Force

HEADQUARTERS 15th AIR BASE WING PUBLIC AFFAIRS DIVISION
HICKAM AFB, HAWAII 96853 449-6367/8368

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4-4-54 df

HICKAM HOSTS JOINT SERVICE OPEN HOUSE

Hickam Air Force Base, Hawaii (April 16, 1981) -- The 32nd Annual Armed Forces Day Open House will be held here Saturday May 16 from 9 a.m. to 4 p.m. The theme this year is the "U. S. Armed Forces -- Strong and Ready."

Top local, country and western, and military entertainment -- provided by the Royal Hawaiian Band, the Aloha Airlines Musical/Hula Troupe, J. T. and the Rowdy Band, Dave West and the Chaingang, Chris Cassidy and the Rainbow Connection, the Skylarks and the Fleet Marine Force Pacific Band -- will perform during the open house.

More than 30 aircraft from the U. S. Army, Navy, Air Force, Marine Corps, Coast Guard, Hawaii Army and Air National Guard, Civil Air Patrol and the Wheeler Aero Club will be on display throughout the day.

Parachute jumps by the Navy and the Marine Corps, Marine troops

-MORE-

EXHIBIT "B"

rappelling from helicopters, aircraft flyovers by the Hawaii Air National Guard, Air Force and the Navy are also scheduled.

Additionally, a crash/rescue demonstration by the Hickam Fire Department, a helicopter rescue demonstration by the Coast Guard and several police dog demonstrations by the Hickam Security Police will be conducted that day.

Also open that day is the annual Air Force Hawaii Youth Festival. Carnival rides, games and a midway packed with food and drinks will be the main attractions. Air Force nominees, representing the various commands at Hickam will compete for the crown of Youth Festival Queen. The crowning ceremony will take place Friday evening at 6 p.m.

Hickam, normally a closed base, will be open to the public for the Armed Forces Day Open House.

-30-

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AERIAL DEMONSTRATION BEEPER

HICKAM AIR FORCE BASE WILL HOST THE 32ND ANNUAL ARMED FORCES DAY OPEN HOUSE THIS SATURDAY FROM 9 TO 4. EXHIBITS, DEMONSTRATIONS AND MORE THAN 30 AIRPLANES WILL BE ON DISPLAY. AN AIR FORCE F-15 WILL PERFORM TWO AERIAL SHOWS DURING THE DAY. THE FIRST SHOW IS AT 11:25 AND THE SECOND AT 3 THAT AFTERNOON. HICKAM'S MAIN GATE OPENS AT 9, THE PUBLIC IS INVITED AND IT'S ALL FREE. THIS IS _____ FOR AIR FORCE HAWAII FOR _____ RADIO.

INCIDENT/COMPLAINT REPORT

(Continue in "REMARKS" on reverse, if necessary)

DATE	INCIDENT/COMPLAINT NO	INVESTIGATION REPORT NO.
18 MAY 81	81-05-103	

☐ INFORMATION ☐ COMPLAINT ☒ COMMANDING OFFICER'S REPORT OF ACTION REQUIRED (See reverse)

THRU:

TO: 15 ABW/JA

FROM: 15 ABW/SPAR

1. SUBJECT	2. GRADE	3. SSN	4. ORGANIZATION (Include location and phone no.)
ALBERTINI, James V.	CIV	163382438	Cath. Action of HI. 1918 Univ. Ave., Hono. 96822

5. DESCRIPTION (Complete on all civilians and military personnel whose identity is in question)

A. COLOR EYES	B. COLOR HAIR	C. COMPLEXION	D. SEX	E. DOB	F. WEIGHT	G. HEIGHT	H. IDENTIFYING MARKS (Tattoo, scar, etc.)
BLUE	BLOND	LT.	M	6DEC 1946	160	69"	N/A

6. HOW DRESSED (Military or civilian, and condition of clothing)

Blue and Green Striped T-Shirt/Blue Jeans/Heat

7. UNDER INFLUENCE OF: ☐ ALCOHOL ☐ OTHER (Explain in item 10)

8. INCIDENT/COMPLAINT (Specify type and location)

TRESPASSING
19 ROW
Hickam AFB, HI.

HOUR: 1305
DATE: 16 MAY 81

9. RECEIVED BY (Typed or printed name, grade, and position)

AIC SUSAN VAN DUZER
DESK SGT., SPOL-EAGLE, HAFB, HI.

☒ IN PERSON ☐ BY TELEPHONE ☐ BY MAIL

10. DETAILS OF INCIDENT (Who, what, when, where, how? Include attitude at time of apprehension and give details if uncooperative. Attach statements of medical personnel.) MAJ. JONES/CSP radioed this office at 1305, 16MAY81, and related that there were two personnel at the Armed Forces Aircraft Exhibit carrying a protest sign against the arms race. COL YEE on scene. A total of five individuals were involved. Two holding a banner reading "Carnival of Death" and "End the Arms race". Three others handing out flyers sponsored by Catholic Action of Hawaii. MAJ. JONES

11. EVALUATION ☐ UNFOUNDED ☐ MISDEMEANOR ☐ FELONY ☐ MILITARY OFFENSE ☐ TRAFFIC

12. PERSONS RELATED TO REPORT (Insert category of relationship letter opposite name)

A. COMPLAINANT B. VICTIM C. SUSPECT D. WITNESS E. MP/SP/AP F. INVESTIGATED BY G. APPREHENDED BY

	NAME	GRADE	SSN	ORGANIZATION OR ADDRESS AND PHONE NO.
EA	JONES, Claude S.	MAJ	500485685	DP/ 449-1653 Chief of Sec. Police, HAFB
E	JONES, Michael E.	1LT	587169444	DP/ 449-9081 OIC LAW ENFORCEMENT, HAFB
E	HATCHER, Kenneth E.	SSGT	265669642	DP/ 449-6372 15SPS/SPOL-EAGLE, HAFB.

13. DISPOSITION OF INCIDENT/COMPLAINT

A. REFERRED TO

- ☐ PATROL
- ☐ SEE REPORT NUMBER AT TOP OF PAGE
- ☒ OTHER AGENCY (Specify) AFOSI, LEGAL
- ☐ NONE

B. OFFENDER

C. EVIDENCE (List and describe, or summarize as appropriate)

REQUEST YOUR REPORT OF ACTION TAKEN BE FORWARDED TO SPAR NOT LATER THAN: 26 MAY 81

14. INCLOSURES (Statements and receipts)

AF FORM 1168
1 Leaflet (copy)
AF FORM 52

15. DISTRIBUTION

1 - 15 ABW/JA
1 - File

FOR THE COMMANDER (Strike out if inapplicable)

TYPED NAME, GRADE AND TITLE OF REPORTING OFFICER

CHARLIE E. WILLIAMS, SMSgt, USAF
Chief, Administration & Reports Branch

SIGNATURE

Charlie E. Williams

DD FORM 1 JUL 72 1569

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COMMANDER'S REPORT OF DISCIPLINARY ACTION TAKEN. (To be completed by the CO of the offender when the reverse side of this form indicates that disposition information is desired. Indicate actions in Items 4 and 5, if applicable, and explain as required in Item 6. Forward through command channels within TEN days of receipt of the report. To facilitate transmission, turn this side face up when returning correspondence through message center.)

DATE: 28 May 1981

THRU:

TO: 15 ABW/SPAR

FROM: 15 ABW/JA

1. OFFENDER	2. GRADE	3. SSN
Albertini, James V.	Civ	

4. ACTION				5. COURTS-MARTIAL					
ADMINISTRATIVE	NON-JUDICIAL	JUDICIAL		SUMMARY		SPECIAL		GENERAL	
		PENDING (Charges forwarded)	COMPLETED	PENDING	TRIAL COMPLETED	PENDING	TRIAL COMPLETED	PENDING	TRIAL COMPLETED

6. Offense JA Comment: Recommend Albertini be prosecuted in Mag Ct for violation of 1970 Bar.

TYPED NAME AND GRADE OF COMMANDING OFFICER: H. RAY STARLING, Captain, USAF
Assistant Staff Judge Advocate

SIGNATURE: H. Ray Starling

REMARKS

asked for a patrol to stand by the entrance to the 19 Row, Aircraft static display, to escort the individuals off of the base. AIC ROTHDIENER dispatched, and made contact with the individuals.-Upon attempting to accomplish Field Interview cards on the individuals they refused to identify themselves, at which time COL. PARRISH related via radio that if they refused to identify themselves they were to be transported to the L/E Desk and detained untill properly identified. The individuals stated that they had given their names to MAJ. JONES, and believed it was harrassment by the SP's to be asked for their names again. At that time the individuals were escorted by AIC ROTHDIENER, and Sgt. LACROIX. AIC ROTHDIENER escorted a female (start 1330, 26916.2, finish 1334, 26916.7 mileage). Upon entering Bldg. 1001, SSgt METZ/SPOL-TIGER, made contact with the individuals who then identified themselves as Civilians ALBERTINI, James V.; HARADA, Nathan Y.; INGLIS, Wallace J.; OKUBO, Setsu; and RENKOSKI, Ronald C.. Field Interview cards were accomplished on all of the individuals involved., and stored at the L/E Desk in the F.I. Card File. Upon conducting a check of the HAFB DEBARRMENT Listing, it was confirmed that ALBERTINI, James V. was barred from base, at which time he was apprehended for trespassing, advised of his rights IAW 5th Amendment/Tempia, to which he refused to acknowledge. All individuals released at 1526 hrs, 16MAY81, with the exception of ALBERTINI. ALBERTINI was detained until such time as it was discovered that the U.S. Marshall would not be responding to sign for the individual, at which time he was released to his own recognicanee and escorted off of the installa tion at 1638 hrs., 16MAY81 by AIC YAX/SPOL-TIGER. COL. PARRISH; COL. YEE; MAJ. JONES; 1LT JONES; FBI AGENT MARSHALL; AFOSI AGENTS ROBERTSON and WEEELEY; CAPT WOODRING/SJA; SSgt HATCHER; and SSGT CASTANARES/SIR MONITOR notified.

U.S. G.P.O. 1980-310-971/4077

STATEMENT OF SUSPECT

PART I — ACKNOWLEDGMENT OF RIGHTS

I, ALBERTINI, JAMES VINCENT 163-38-2438, state that before I was questioned by SGT. HATCHER, KENNETH E. 264-66-9642, he identified himself to me as SECURITY POLICEMAN, USAF. He told me that I

(Special Agent OSI, Security Police Investigator; etc.)

was suspected of being involved in the offense(s) of TRESPASSING (ON BARREN LIST)

He told me, and I understand that:

(1) I have the right to remain silent, that is, say nothing at all;
(2) Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial or administrative proceedings;
(3) I have the right to consult with a lawyer;
(4) I have the right to have a lawyer present during this interview;
(5) I may obtain a civilian lawyer of my own choosing, at my own expense;
(6) Civilians: If I cannot afford a lawyer, the Air Force will give me reasonable assistance in obtaining a civilian lawyer;
(7) Military: If I wish, a military lawyer will be appointed for me free of charge;
(8) I may request a lawyer any time during the interview;
(9) If I decide to answer questions without a lawyer present, I may stop the questioning at any time.

I have also read the foregoing language. I completely understand my rights. I do not wish to exercise my right to remain silent. *(I do want a lawyer.) (I do not want a lawyer.)* I want to make the following statement voluntarily and of my own free will. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

WITNESS:

Kenneth E. Hatcher
(Signature of Interviewer)

REFUSED TO ACKNOWLEDGE RIGHTS
(Signature)

1400 HRS 16 NOVEMBER BLDG 1001 HAFB, ME.
(Time, date and location)

PART II — STATEMENT

AF FORM MAY 79 1168

PAGE 1 OF PAGES

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ARMED FORCES DAY

1. SITUATION: This Operations Order provides for the support of the 1981 Armed Forces Day (Open House). The Armed Forces Day display will be on the flightline (19 Row). Operation hours for Armed Forces Day display will be 16 May 81, 0900 - 1600 hours. The 15th Security Police Squadron (overhead) will be responsible for carrying out the program herein.

2. OBJECTIVES: Provide traffic control, crowd control parking supervision.

3. TASK: Project officer will assign detail for Armed Forces Day traffic and parking supervision.

Detail Members:
Project OIC: Lt Jones
Project NCO: SSgt Calhoun

NCOIC, Armed Forces Day: TSgt Castanares
NCOIC Traffic: SSgt LaCroix

Crosswalk:
Post 1 SSgt Barnes (& Exit)
Post 2 SSgt Pokoroy
Post 3 SSgt Jackson
Post 4 Sgt Gallagher
Post 5 SSgt Stradling

Parking Lot #1:
SSgt Cheshire
AlC Gill
AlC Bollendorf
Civil Air Patrol X 2

Parking Lot #2:
SSgt George
Civil Air Patrol

Relief:
Sgt Cheshire
SrA Van Horn
SSgt Lindell
AlC Butler
Sgt Robinson

AlC Madela
AlC Butler
Civil Air Patrol X 2, second shift

Detail Members

1 Will not consume any alcoholic beverages 8 hours prior to duty nor will they consume any alcoholic beverages while on duty.

2 Will be dressed in combination 4 uniform with beret, whistle, white gloves, badge.

3. Radio Communication Call Signs:

1 Project OIC will utilize the call sign TANGO (3).

2 Armed Forces Day NCOIC will utilize the call sign TANGO (4).

3 Traffic NCO will utilize the call sign TANGO (5).

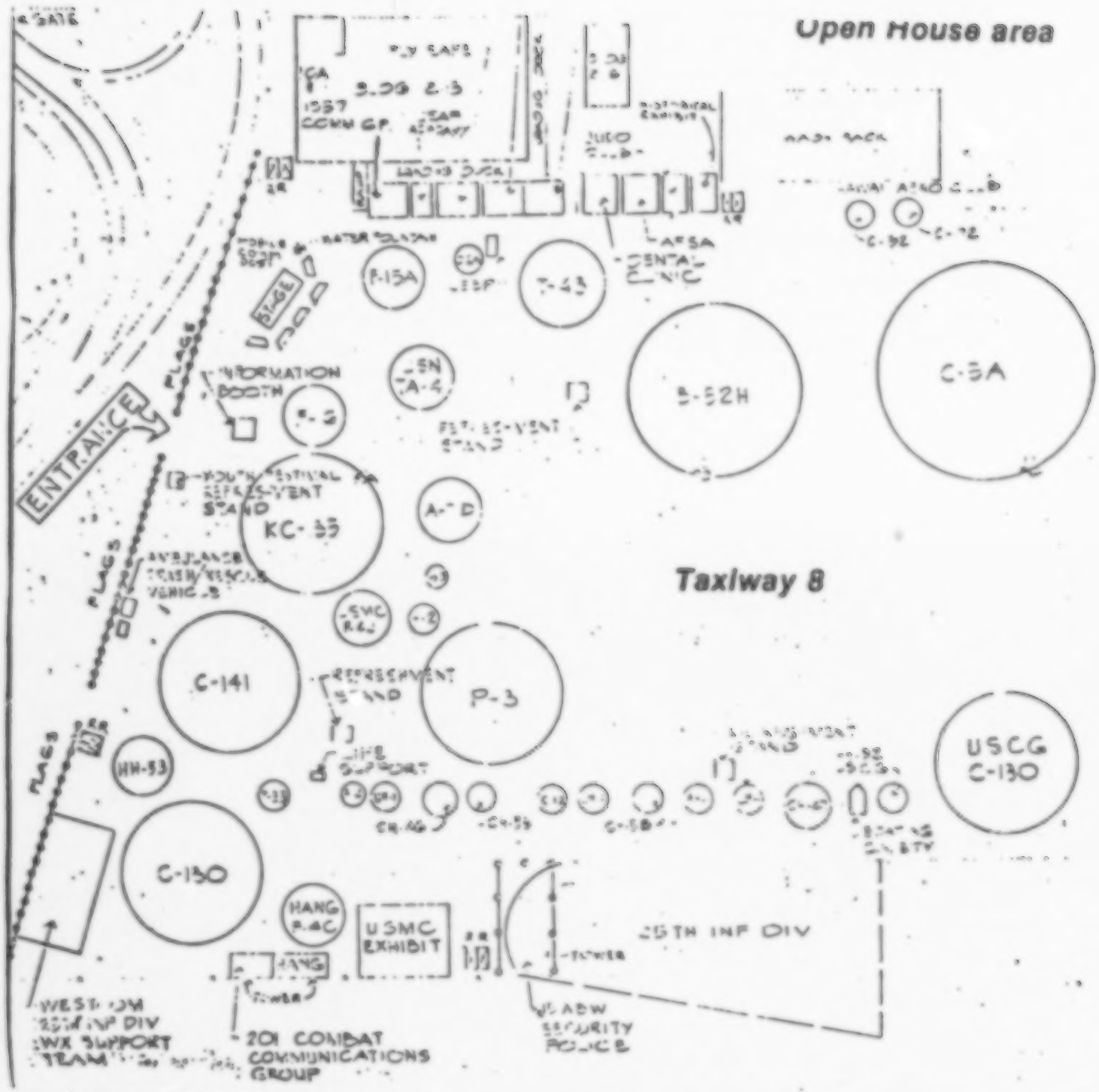
4. Guardmount:

Guardmount will be held at Bldg 1001 parking lot next to LE Desk NLT 0745 hrs, 16 May 81.

Claude S. Jones

CLAUDE S. JONES, Major, USAF
Chief, Security Police

1 Atch
Armed Forces Display



9 a.m.	Open House Begins
9-9:45 a.m.	Royal Hawaiian Band
9:25 a.m.	Flyover T-33s
9:40 a.m.	Flyover F-4s HANG
9:50 a.m.	Flyover 0-2
10 a.m.	Sentry dog demonstration
10-11 a.m.	Aloha Airlines Band
10:20 a.m.	Flyover F-4s
10:25 a.m.	Flyover T-33s
10:30-10:50 a.m.	Parachute exhibition, USN/USMC
11-11:20 a.m.	USMC CH-46 helicopter/rappelling demonstration
11:25 a.m.	F-15 aircraft demonstration, 7-8 min.
11:30-12:15 a.m.	JT And The Rowdy Band
12:15-1 p.m.	Londie Mason And Country Shadows
12:25 p.m.	Flyover T-33
12:40 p.m.	Flyover F-4s HANG
12:50 p.m.	Flyover A-7s
1-2 p.m.	Chris Cassidy And The Rainbow Connection
1:10 p.m.	Sentry dog demonstration
1:20 p.m.	Flyover F-4s HANG
1:30 p.m.	Flyover T-33s
1:30 p.m.	Crash/rescue demonstration/Hickam Fire Department
1:40 p.m.	Helicopter crash/rescue demonstration, USCG
2-2:20 p.m.	Parachute exhibition, Tropic Lightning Sport Parachute Club
2:30-2:50 p.m.	US Army helicopter/rappelling demonstration
3 p.m.	5-15 aircraft demonstration
3:10-3:30 p.m.	Hickam Skylarks
3:30-4:30 p.m.	FMF PAC Band
4 p.m.	Open House ends

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PEACE

THE MOST URGENT ISSUE OF OUR DAY IS EXISTENCE UPON A NUCLEAR VOLCANO

Since the entrance of Jesus Christ into human history there have been fifty eight generations. We are the generation which has the destructive capacity to bomb ourselves back into the middle ages. This age is not ours; We have borrowed it from future generations and are foolish enough to put aside the principle of building a better civilization for future generations with our fascination for nuclear weapons.

We can no longer carelessly say "there has always been warfare and it will always be this way." After reconsidering the destruction of Hiroshima and Nagasaki in 1945 we must remind ourselves that the explosive power in the world has increased 1.5 million times. We must begin to imagine what we already know and then our behavior might begin to change.

In Feudal times people said it was impossible to live without slavery. In the age when nations were ruled from thrones of kings and queens it was said that life would be impossible without monarchies. In the colonial era the dominating countries thought it would be impossible to survive without colonized nations. Although a few isolated colonies still exist throughout the world together with a small number of nations under a monarchy, the future of the world does not belong to colonial powers and monarchies because people have seen it fitting to live in more humane ways. The last institution to be declared unfit for civilized societies is warfare.

We are slow learners indeed. While we try to educate ourselves in the art of resolving conflicts without warfare it is necessary to come to a quick resolution of declaring nuclear weapons to be a crime against humanity. "History is a race between education and catastrophe." If we do not outlaw the use of nuclear weapons internationally the odds are that a catastrophe will occur before the year 2000 and the effects will go far into future generations.

There are over 50,000 nuclear weapons throughout the world. While some leaders (unfortunately not our own) at least say they will never be the first to use these ghastly weapons, we need to recall that such a war might come about accidentally when computers go berserk as in the past and scream "the missiles are coming." The USA has over 30,000 nuclear weapons stockpiled. Many of them right here in our midst. In the USSR there are only 200 cities with a population of 100,000 or more. Just how many weapons are enough? In the nuclear nightmare we are told by physicians and scientists that 200 severe burn cases would paralyze the entire medical system of our country. The opening hour of the war would kill tens of millions and severely burn even a greater number. The living would envy the dead. The only survivors of nuclear weapon tests in the Bikini atoll are rats.

In 1972 a staunchly anti-communist Richard Nixon made a secret overture to the Peoples Republic of China through Henry Kissinger. Whatever the motivations behind this occurrence, a tense situation was diffused. In the same decade a $5 billion ICBM system directed at China was dismantled. For decades we have been told that China and the USSR are our mortal enemies and we must build more weapons. Some NATO nations are in dis-

agreement with our position on nuclear weapons. We are pushing the Japanese to become more militaristic and to spend more on weapons. We are the only nation in the world to support the present brutal government in El Salvador. It is apparent that all social programs (including social security) in the U.S. will be cut while $1.4 trillion will be spent on weapons in the next five years. This program will lead us to bankruptcy or war -- or both.

If world leaders do not take the initiative to declare the use and mere possession of nuclear weapons as criminal behavior then the people must do so for them. The threat of global nuclear destruction must be ended here and now.

Brothers and sisters, there is still time while the missiles are grounded. But the hour is getting late.

RESISTANCE MEANS LIFE

Catholic Action of Hawaii
1918 University Avenue
Honolulu, Hawaii 96822
Phone 946-6303

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 15TH AIR BASE WING (PACAF)
HICKAM AIR FORCE BASE, HAWAII 96853

6 MAR 1981

ATTN: CC

SUBJ: Prohibited Entry

TO: Ms. Mary C. Inglis
2357C Palolo Avenue
Honolulu HI 96816

1. It has been reported to me that on or about 4 March 1981, at Camp Smith, Hawaii, you and several other persons entered a secured area, the Office of Nuclear Plans and Policy Division, Commander in Chief, Pacific, and therein wrongfully defaced government property and caused a disturbance.

2. As Commander of the 15th Air Base Wing, I find your actions contrary to the maintenance of good order and discipline on Air Force installations.

3. Therefore, you are hereby ordered not to enter upon any U.S. Air Force base or installation on the island of Oahu, Hawaii, for a period of two years effective upon your receipt of this letter. If within seven days after you receive this letter you can show me in writing just cause why you should not be so barred, I will consider modifying or rescinding this action against you. However, until such time as you receive a rescission or modification of this order from me, the barment will stand as stated above.

4. Violation of this order is a federal crime under Title 18, United States Code, Section 1382. Upon conviction you could receive a fine of up to $500 and imprisonment up to six months.

5. You should be aware that this base actively pursues prosecution of violators of these prohibited entry orders in the Federal Courts.

JOHN A. PARRISH Jr., Colonel, USAF
Commander

Cy to: 15 ABW/SP
15 ABS/SP
Det 1, 15 ABW/SP

EXHIBIT "D"

UNITED STATES MARINE CORPS
HEADQUARTERS AND SERVICE BATTALION, FMFPAC
CAMP H. M. SMITH
CAMP H. M. SMITH, HI 96861

IN REPLY REFER TO
17/CJK/tmd
5510
16 MAR 1981

Ms. Mary C. Inglis
2357-C Palolo Avenue
Honolulu, Hawaii 96816

Dear Ms. Inglis:

On 4 March 1981 you entered Camp H. M. Smith, Hawaii, without proper authorization and in a manner so as to disrupt the security, safety, welfare, and military operations of the personnel working and living there. Your conduct establishes that your presence aboard this military installation is not in the best interest of this command.

Accordingly, under the authority vested in me as Camp Commander, Camp H. M. Smith, Hawaii, you are hereby informed that you are not to reenter the military installations designated as Camp H. M. Smith, Aiea, Camp H. M. Smith Training Facility (Puuloa Rifle Range) or Manana Housing Area for a one (1) year period commencing 4 March 1981 without my prior written consent. Should any compelling reason exist which you believe would be sufficient to justify a modification or earlier termination of this bar letter, you should submit a written request to the Camp Commander, Camp H. M. Smith, Hawaii 96861 no later than fifteen days prior to the date you desire access.

Should you be discovered within the confines of any of the above installations, you will be subject to prosecution in United States Federal Court under Title 18, Chapter 67, Section 1382 (Criminal Code), which provides as follows:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof-
>
> Shall be fined not more than $500.00 or imprisoned for not more than six months or both.

17/CJK/tmd
5510

This bar letter is in effect until 4 March 1982. At that time, authorization for you to reenter the military installations of Camp H. M. Smith, Aiea, Camp H. M. Smith Training Facility (Puuloa Rifle Range) and the Manana Housing Area will be reevaluated. You will be notified of the decision.

JAMES G. MCCORMICK
Colonel, U.S. Marine Corps
Commander

Copy to:
SAIC, FBI (Honolulu)
SPA, NIS (Pearl Harbor)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR. NO. 81-00890

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES ALBERTINI, DEFENDANT.

MEMORANDUM ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The defendant, JAMES VINCENT ALBERTINI, is charged with unlawfully reentering Hickam Air Force Base ("Hickam") on May 16, 1981, in violation of 18 USC § 1382.

He moves to dismiss the Information claiming that the application of Section 1382 is invalid as a matter of law and/or unconstitutional because (1) Hickam was "open" to the public on May 16, 1981 and he was "engaged in a peaceful, non-disruptive exercise of his First Amendment Right of Free Speech", and because (2) the "bar letter" underlying this prosecution was issued more than 9 years prior to May 16, 1981, the date of the present offense.

The matter came on for hearing on November 13, 1981 with the government being represented by Special Assistant United States Attorney H. Ray Starling and the defendant by Steven J. Trecker, Esq.

On March 2, 1972, the Headquarters Commander of the 15th Air Base Wing (PACAF) at Hickam issued a "bar letter" to Albertini as a result of an incident in which Albertini and two compansions (James Douglas and Charles Giuli) entered an office at the Headquarters and poured animal blood on documents classified "Secret". They were charged with two counts of conspiracy to destroy government records in violation of 18 U.S.C. §§ 2, 371 and 1361. *See United States* v. *James Vincent Albertini, James Wilson Douglas and Charles A. Giuli*, Criminal No. 13,009, District of Hawaii. On August 15, 1972, Albertini

and Douglas were tried by jury and convicted of both counts. A motion to dimiss as to Giuli was granted. Albertini was sentenced on September 5, 1972 and received a $500.00 fine and one year probation. But on August 31, 1973, Albertini's probation was revoked and he was given a 90-day executed jail term and fined $250.00.

> "You are being removed as a trespasser from Hickam Air Force Base ... and ordered not to reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry."

The facts of this case show that on May 16, 1981, Hickam held an "Armed Forces Day Joint Service Open House" from 9:00 A.M. to 4:00 P.M.[1] Hickam issued a number of news releases[2] to publicize the event. Albertini is relying on the following excerpts to support his argument that Hickam was an "open" base on May 16, 1981.

One release, Exhibit "A", read:

> "While Hickam is normally a closed base, the gates will be open to the public for this 32nd Annual Armed Forces Day Open House."

Another release, Exhibit "B", read:

> "Hickam, normally a closed base, will be open to the public for the Armed Forces Day Open House."

A third release, Exhibit "C", read:

> "Hickam's main gate opens at 9, the public is invited and it's all free."

Drawing from these passages, Albertini argues that Hickam was indeed an "open" base in the way that Fort Sam Houston was an "open" fort in *Flower* v. *U.S.*, 407 U.S. 197 (1972), a case heavily relied upon by Albertini.

The argument is unsound. While the Supreme Court in *Flower* found Fort Sam Houston to be an "open" installation, it did so by holding that the fort commander "chose not to exclude the public from the street where petitioner was arrested". 407 U.S. at 198. The court further held that

[1] With respect to the March, 1972 incident, Hickam was not an "open base" when Albertini and his friends came onto Hickam and committed the offenses for which he was convicted.

[2] See Exhibits "A", "B" and "C" attached to the motion to dismiss.

the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue". *Id.* The court noted:

> There is no sentry post or guard at either entrance or anywhere along the route. Traffic flows through the post on this and other streets 24 hours a day. A traffic count conducted on New Braunsfels Avenue on January 22, 1968, by the Director of Transportation of the city of San Antonio, shows a daily (24-hour) vehicular count of 15,110 south of Grayson Street (the place where the street enters the post boundary) and 17,740 vehicles daily north of that point. The street is an important traffic artery used freely by buses, taxi cabs and other public transportation facilities as well as by private vehicles, and its sidewalks are used extensively at all hours of the day by civilians as well as by military personnel. Fort Sam Houston was an open post; the street, New Braunfels Avenue, was a completely open street."

There is logic in the court's decision in *Flower* for the description of Fort Sam Houston indicated that the fort was perhaps truly an "open" fort. But that is not the case here.

On the day in question, May 16, 1981, Hickam was enclosed by a perimeter fence with armed guards situated at all entrances to the base and security police patrolling the streets. There was no free flow of traffic through the base 24 hours a day. None of the streets on base was considered "an important traffic artery used freely by buses, taxi cabs and other public transportation facilities as well as by private vehicles". None of the sidewalks on the base was "used extensively at all hours of the day by civilians as well as by military personnel". There was no "traffic count" as to any of the streets on the base which shows "a daily (24-hour) vehicular count of 15,100" or "17,740", or anything close to these numbers.

While during the hours of 9:00 A.M. and 4:00 P.M. on May 16, 1981 the general public was invited onto Hickam for an "open house" display of military hardware in observance of Armed Forces Day, armed gate guards remained on duty controlling access to the base and security policemen continued to patrol the streets maintaining law and order. Hickam continued to operate as a military installation and clearly was not an "open" base in the sense that Fort Sam

Houston was. It cannot be said, therefore, that Hickam had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets" on the base. Carrying the *Flower* holding to its ultimate conclusion, one would have to therefore concede that the Hickam authorities abandoned their right to keep criminals and miscreants previously barred from base from reentering the base. The facts here to do not support that conclusion.

It should be remembered that Albertini's earlier involvement with the law in 1972 on Hickam resulted in a trial, conviction and jail term. This 1972 incident gave rise to Albertini being issued the bar letter in question. On the other hand, in *Flower*, the defendant received a bar letter for merely attempting to exercise his First Amendment rights on what the court determined to be an "open" installation. Thus, when Albertini and his two friends entered Hickam in March 1972 and poured blood on secret documents, they did so when the base was not "open" as was the fort in *Flower*. This is an important distinction. Albertini's case does not fit squarely into *Flower*.

Four years after *Flower*, the Supreme Court handed down a decision explaining *Flower*. *Greer* v. *Spock*, 424 U.S. 828 (1976). *Spock* is the leading case in the area of the regulation of speech on a military base. In laying to rest the misconceptions lower courts were having about *Flower* and what it meant, the High Court said:

> "The Court of appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please . . .' The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." 424 U.S. at 836.

In the *Spock* case, Spock and some friends requested from the commander an opportunity to enter Fort Dix for the purpose of distributing campaign literature and holding a meeting to discuss election issues with military personnel and their dependents. The commander rejected the request. Spock and his associates then filed suit to enjoin the prohibition to enter the post. The district court reluctantly granted an injunction and the court of appeals affirmed. The Supreme Court reversed stating:

> "Indeed, the *Flower* decision looks in precisely the opposite direction. For if the *Flower* case was decided the way it was because the military authorities had 'abandoned any claim of special interest in who walks, talks, or distributes leaflets on the avenue,' *then the implication surely is that a different result must obtain on a military reservation where the authorities have not abandoned such a claim. And if that is not the conclusion to be drawn from Flower, it most assuredly is the conclusion to be drawn from almost 200 years of American constitutional history.*" (Emphasis added) 424 U.S. at 837.

The court determined that:

> "The Court of Appeals in the present case did not find, and the respondents do not contend, that the Fort Dix authorities had abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation. The *Flower* decision thus does not support the judgment of the Court of Appeals in this case." 424 U.S. at 837.

Summing up, the court declared:

> "A necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power of its commanding officer summarily to exclude civilians from the area of his command . . . The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." 424 U.S. at 838.

The facts in this case do not support the proposition that Hickam, by having an "open house" for Armed Forces Day,

had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets" on the base.

Finally, Albertini's argument that the bar letter here is ineffectual because it was issued 9 years earlier and cannot be extended for an indefinite period of time is incorrect. The bar order was intended to be indefinite because of the incident Albertini caused by coming onto the base and destroying classified documents. The letter specifically states that he is not to reenter Hickam "without the written permission of the Commander or an officer designated by him to issue a permit of reentry." There is nothing legally proscriptive about this kind of barment.

It is interesting to note that in a case involving the same James Douglas convicted with Albertini in Criminal No. 13,009 in this district,the Ninth Circuit was called upon to affirm a later conviction of Douglas in the case of *U.S.* v. *Douglas*, 579 F.2d 545 (9th Cir. 1978), which involved a prohibitive reentry on the Submarine Naval Base in Bremerton, Washington. In *Douglas*, the commander of the base had earlier issued Douglas a bar letter ordering him not to reenter the base. The letter was substantially the same as the letter in the present case. There was no time limitation as to the prohibition. Douglas reentered the base to engage in protestations and leafletting. He was later tried and convicted under 18 USC § 1382 and appealed. The Ninth Circuit rejected his appeal inferentially holding that the indefiniteness in terms of time of the letter did not make the barment any less valid. Albertini cites no legal authority to support his argument that the bar letter was of no legal efficacy because 9 years had lapsed from the time of its issuance.

Based on the foregoing, the motion is found to be lacking in merit and is accordingly DENIED.

IT IS SO ORDERED.

DATED: Nov. 20, 1981, at Honolulu, Hawaii.

/s/ Thomas P. Young
THOMAS P. YOUNG
United States Magistrate

Supreme Court of the United States

No. 83-1624

UNITED STATES, PETITIONER,

v.

JAMES VINCENT ALBERTINI

ORDER ALLOWING CERTIORARI. Filed *December 3, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted. In addition to the question presented in the petition, the parties are requested to address the following question: Whether the respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. Section 1382?

PETITIONER'S

BRIEF

(7)

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No. 83-1624

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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47pp

QUESTIONS PRESENTED

Whether the First Amendment prohibits the enforcement of 18 U.S.C. 1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer, against a civilian who is subject to a valid bar order but reenters the base during an "open house" for the purpose of engaging in an antiwar demonstration.

In its order granting certiorari, the Court requested the parties also to address the following question:

Whether respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. 1382.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1624

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 710 F.2d 1410. The memorandum of the magistrate denying the motion to dismiss the indictment (J.A. 63-68) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on July 22, 1983. A petition for rehearing was denied on January 4, 1984 (Pet. App. 16a). On February 23, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to April 3, 1984. The petition was filed on that date and granted on December 3, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard Reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

STATEMENT

1. In March 1972, respondent and a companion entered Hickam Air Force Base, Hawaii, ostensibly to present a letter to the commanding officer. Instead, they obtained access to secret Air Force documents and destroyed them by pouring animal blood on them. Respondent was convicted of conspiracy to injure government property in violation of 18 U.S.C. 371 and 1361. As a consequence of this incident, respondent also received a "bar letter" signed by the commanding officer of Hickam. Pet. App. 3a n.1. This letter stated (J.A. 43):

> You are being removed as a trespasser from Hickam Air Force Base, a military reservation, and ordered not to reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry.

The second paragraph of the bar letter stated: "Your attention is invited to 18 U.S.C. 1382" (J.A. 43), and

then quoted that statute, which makes it unlawful for any person to reenter a military installation "after having been removed therefrom or ordered not to reenter by any officer or person in command."

In March 1981, respondent, according to his own testimony, unlawfully entered the Nuclear War Policy and Plans Office at Camp Smith, Hawaii, a sensitive and secured area, for the purpose of engaging in what respondent described in court as "a rather serious clear-cut case of non-violent civil disobedience" (J.A. 30). Respondent testified that he was not prosecuted for this action, but as a result of it the commander of Hickam Air Force Base issued respondent another bar letter, which was sent to respondent by registered mail but was returned unclaimed. Respondent volunteered, in his testimony at trial, that he had "received several bar letters over the years from a number of military bases here in Hawaii" (*ibid.*).[1]

On May 16, 1981, respondent reentered Hickam during "Armed Forces Day," the base's annual open house. On this day, members of the general public, who ordinarily can enter Hickam only with permission, are permitted to enter certain portions of the base, and various events are held for their benefit. For example, in this case the Air Force displayed aircraft and other equipment; servicemen engaged in parachute jumps and "flyovers"; and various amusements were provided, such as musical performances and carnival rides. Certain portions of the base re-

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[1] In subsequent testimony, after respondent recounted further details about the bar letters he had received, the trial judge asked him: "Have you collected one from each base yet?" and respondent replied: "Pretty much" (J.A. 39).

mained closed to the public even during the open house. Pet. App. 2a-3a; J.A. 44-47.

Respondent was apprehended during the open house while he was accompanying a group of persons engaged in an antiwar demonstration. The other demonstrators passed out leaflets and held up a sign, but respondent himself did neither. See J.A. 12, 25; Br. in Opp. 5 & n.9.[2] The testimony at trial showed that before respondent was approached by any base personnel, the base commander had recognized respondent as the holder of a bar letter and so advised a base security officer. That officer then sought out respondent, approached him, and said respondent's name; when respondent answered, the officer asked him for identification. Respondent presented a driver's license bearing his name and was taken into custody. Base security officers subsequently confirmed that respondent had received a bar letter. See J.A. 9-11, 13-14, 35, 36.

Respondent was charged with violating 18 U.S.C. 1382. After a trial before a judge in the United States District Court for the District of Hawaii, he was convicted and sentenced to three months' imprisonment (J.A. 1).

2. The court of appeals reversed respondent's conviction (Pet. App. 1a-15a). The court "reject[ed] the contention that newspaper advertisements inviting the general public fulfilled the 'written permission' requirement of the bar letter" (*id.* at 4a) but

[2] One of the demonstrators, in testimony at trial, said that she knew that respondent had been barred from Hickam—indeed, that "all of us knew" that respondent was barred—and that she knew "about subsequent cases, too" in which respondent had received bar letters (J.A. 26).

ruled that respondent's conviction violated the First Amendment.

The court of appeals began its discussion by stating that respondent's "first amendment argument rests upon the assertion that on Armed Forces Day Hickam was a 'public forum' where the right to leaflet could not be unreasonably circumscribed" (Pet. App. 4a). Almost all of the court of appeals' opinion was then devoted to a lengthy analysis of whether Hickam was indeed a "public forum" during the open house (*id.* at 4a-13a). The court acknowledged that "[a] military base, even one open to the public, is not a traditional public forum" (*id.* at 5a). But the court concluded that "the open portions of Hickam Air Force Base" during the open house constituted "a public forum," or at least "a 'limited public forum'" (*id.* at 8a, 10a). The court further ruled that respondent's "manner of expression was not basically incompatible with [the] activity of Hickam at that particular time" (*id.* at 11a). The court accordingly stated (*id.* at 13a): "We conclude that members of the public had a first amendment right to hold signs and pass out leaflets at Hickam Field on Armed Forces Day."

The court of appeals then briefly considered the significance of respondent's bar letter (Pet. App. 13a-14a). The court held that the bar letter did not alter its conclusion that respondent's "actions on Armed Forces Day were constitutionally protected" (*id.* at 15a). The court of appeals reached this result on the authority of *Flower* v. *United States*, 407 U.S. 197 (1972), which, it stated, established that "the military loses its power to exclude when a base becomes a public forum" (Pet. App. 13a).

SUMMARY OF ARGUMENT

I. Respondent's attendance at the open house at Hickam violated 18 U.S.C. 1382. The plain language of that statute alone makes this conclusion manifest. Section 1382 makes it unlawful to "reenter[] or [be] found within any [military] * * * installation, after having been * * * ordered not to reenter" by the commanding officer. Hickam is unquestionably a military installation; respondent admitted that he had received a letter ordering him not to reenter Hickam; and under no remotely plausible meaning of the terms can it be denied that respondent both "reenter[ed]" Hickam and was "found within" the base.

The legislative history and structure of Section 1382 confirm the conclusion dictated by the plain language. The legislative history shows that Congress intended the second paragraph of Section 1382—the provision under which respondent was convicted—to apply primarily in situations in which a military base is generally open to members of the public. Specifically, the purpose of Section 1382 was stated to be to ensure that base commanders would not be powerless when individuals they had barred from the base repeatedly reentered it—a situation that will generally arise only when the general public has access to the base. Moreover, the second paragraph of Section 1382 would be superfluous unless it were intended to apply in situations in which a base is open to members of the public generally; the first paragraph is sufficient to exclude unauthorized persons in other situations.

There is no basis for distinguishing between a situation in which a base is routinely open to members of the public—the situation for which the second paragraph of Section 1382 is primarily intended—and a one-day open house. Indeed, as a practical matter, the

prohibitions contained in Section 1382 are more acutely needed during an open house; the large crowds of strangers, and the fact that they are on a base sufficiently sensitive that it is ordinarily closed to the public, create security concerns that are significantly greater than those that exist on a base that is routinely open to the public.

II. The First Amendment does not prohibit the enforcement of Section 1382 against respondent. Contrary to the court of appeals' approach, this case does not involve the right of members of the public to demonstrate on Hickam during an open house. Rather, it involves the enforcement of Section 1382—a wholly neutral prohibition that is unrelated to the content of speech or even to whether speech has occurred at all—against an individual who had previously been barred from the base. Respondent was barred from Hickam for reasons unrelated to speech, and he was prosecuted not because he engaged in any form of communication but solely for his act of reentering the base.

Any incidental effect that the application of this neutral, non-speech related prohibition might have had on respondent's exercise of his First Amendment rights is more than offset by the government's important interests in protecting military installations against persons who have proven themselves to be a threat to their security and good order. This Court has described a commanding officer's authority to exclude civilians from his base as a "historically unquestioned power" (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)). When an open house is held at a base that is ordinarily closed, the need for a commanding officer to be able to exercise this authority is, if anything, greater than in other contexts.

The exercise of that congressionally authorized power here did not deprive respondent of the opportunity to express his views by any means not involving his reentry onto the base.

ARGUMENT

I. RESPONDENT'S ATTENDANCE AT THE OPEN HOUSE VIOLATED 18 U.S.C. 1382

In its order granting certiorari, the Court requested the parties to address the question "[w]hether respondent's attendance at the 'open house' at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U.S.C. 1382." J.A. 69. We submit that "[t]he plain language of [Section 1382] is sufficient to resolve th[is] question" (*United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6). If 18 U.S.C. 1382 is interpreted according to its plain meaning, respondent unquestionably violated it. Moreover, the legislative history of Section 1382, far from contradicting the plain language, provides further evidence that Congress intended to prohibit actions like respondent's; and important policy considerations support the same conclusion.[8]

A. Section 1382 is not ambiguous. It provides that "[w]hoever reenters or is found within any [military] reservation, post, fort, arsenal, yard, station,

[8] We note in addition that regulations in force at Hickam at the time of the open house specifically provided that "[p]ersons who have been barred from entry to the base will not be permitted entry to the installation during" an open house. 15th Air Base Wing Reg. 125-4, para. 4c(5) (20 Oct. 1979). Base commanders were instructed that these regulations were to be "conspicuously posted at base or station entry points." *Id.* para. 2.

or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof" is guilty of a misdemeanor. It cannot seriously be disputed that Hickam is a military installation covered by the statute; respondent has never suggested otherwise. Nor can it plausibly be contended that those portions of Hickam that were opened to the public during the open house somehow temporarily ceased to be a "military installation"; Section 1382 sweepingly encompasses all military installations of every description. There is no basis for any suggestion that Congress meant to distinguish among different areas within military installations on the basis of the kinds of activities by the military that are occurring within them at a particular time. See generally *United States* v. *Parrilla Bonilla*, 648 F.2d 1373, 1383-1385 (1st Cir. 1981); *United States* v. *Douglass*, 579 F.2d 545, 547 (9th Cir. 1978).

Respondent "reenter[ed]" Hickam within the plain meaning of that term. He had previously entered it to commit the acts of vandalism that resulted in his receiving a bar letter, and he passed through its gates again to attend the open house. See J.A. 54. Only by giving a wholly artificial meaning to the word could one avoid characterizing this as "reentering." In addition, Section 1382 prohibits the holder of a bar letter not only from "reenter[ing]" an installation but also from being "found within" a military base. The information filed against respondent charged that he "did unlawfully and knowingly * * * reenter and was found within a military reservation" (J.A. 3). Under no conceivable meaning of the term can it be said that respondent was not "found within" Hickam at the time he was apprehended.

Finally, respondent acknowledged that he had received a bar letter from the commanding officer at Hickam; this letter "ordered [him] not to reenter" in the plainest terms. The bar letter referred specifically to Section 1382, so there can be no doubt that it is an "order" within the meaning of the statute. See pages 2-3, *supra*. Respondent challenged the validity of this order in the court of appeals on the ground that it was stale (see Appellant C.A. Br. 11-13; see also Br. in Opp. 9, 31 & n.28), but the court expressly declined to reach that question (Pet. App. 15a), and it is not before this Court.

B. The plain language of Section 1382 thus leaves no room for disagreement over whether respondent violated that provision. This Court has frequently stated that "'[i]f the statutory language is unambiguous, * * * "that language must ordinarily be regarded as conclusive"'" (*Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4, quoting *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), and *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).[4] As the Court recently reiterated (*Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5 (citations omitted)):

> [O]nly the most extraordinary showing of contrary intentions from [other indicia of legislative intent] would justify a limitation on the "plain meaning" of the statutory language. Where we find the terms of a statute unambiguous, judicial inquiry is complete, except in "'rare and exceptional circumstances.'"

[4] See also *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 336 (1981); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *United States* v. *Apfelbaum*, 445 U.S. 115, 121 (1980); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

In any event, the structure of Section 1382, its legislative history, and important practical considerations all confirm what the plain meaning of Section 1382 establishes—that respondent's conduct constituted a violation of that provision.

We can discern three possible arguments respondent might make in contending that he did not violate Section 1382. He might assert that the acts for which he was barred were not sufficiently severe to warrant a barring order; that Section 1382 did not bar his reentry because he intended to participate in a political demonstration; or that Section 1382 did not apply because he reentered at a time when members of the public generally were invited onto the base. None of these possible arguments finds any more support in the legislative history, or in any other source of congressional intent, than it does in the language of Section 1382.

1. Respondent has not claimed that his bar letter was issued for improper or inadequate reasons, and no such claim could be made. Respondent received his bar letter because he engaged in criminal acts of destructive vandalism. A commanding officer has broad power "summarily to exclude civilians from the area of his command" (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961)) and may do so for any reason that is not arbitrary or unconstitutional; he may even exclude persons for conduct that is, unlike respondent's, not criminal. See *id.* at 896-899. Indeed, as we explain below, the legislative history reveals that Congress specifically envisioned that Section 1382 would be used to exclude persons who have engaged in undesirable but noncriminal acts, such as enticing serv-

icemen to "dives" and "saloons" off the base. See pages 14-16, *infra*.[5]

2. Respondent also cannot claim that the plain terms of Section 1382 should not apply to him because he reentered the base for the purpose of engaging in a political demonstration. See, *e.g.*, *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960) (Blackmun, J.). We know of nothing in the legislative history of Section 1382 remotely suggesting that Congress intended that a person barred from a military base would be allowed to reenter for the purpose of demonstrating. As we explain in Part II of this brief, respondent had no constitutional right to reenter the base for that purpose; it therefore cannot be suggested that Section 1382 should be construed to permit such a reentry in order to avoid a constitutional question.

Moreover, the structure of Section 1382 firmly precludes any argument that respondent's purpose in reentering the base was material. See *Holdridge*, 282 F.2d at 308-310. Respondent was charged with a violation of the second paragraph of Section 1382, which, as we have noted, contains an unqualified prohibition against reentering or being found within a base. By contrast, the first paragraph of Section 1382 makes it a crime to "go[] upon any military installation, *for any purpose prohibited by law or lawful regulation*" (emphasis added). Congress could have, but did not, enact a similar qualification in the second paragraph, specifying that reentry after receiving a bar letter is forbidden only if done for certain purposes. "The deliberate omission of a similar moderating provision in

[5] We are advised by the military that today bar letters are typically used to deal with such problems as small-scale drug trafficking.

[the second paragraph] compels the conclusion that Congress meant [it] * * * to be administered as written" (*INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 6)—that is, that Congress meant to prohibit all reentries by previously barred persons, whatever their purpose. See, *e.g.*, *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 7-8.

3. Finally, the fact that respondent reentered Hickam during an "open house," when members of the public generally were permitted on the base, is not a reason to depart from the plain dictates of Section 1382. The prohibition that became Section 1382 was first enacted in 1909. In considering the legislation Congress did not, of course, specifically address itself to military open houses. But Congress was aware at the time that many military installations were open to members of the public generally.[6] The same is true today: some installations are routinely open to members of the public; others are open on specific occasions or for certain purposes, including but not limited to open houses. When a base is not open to the public, individuals seeking to enter are screened, and they can enter only with specific authorization.

It is entirely clear from both the legislative history of Section 1382 and its structure that Congress intended its prohibitions to apply with full force on

[6] Indeed, military regulations in force at the time provided that even with respect to the most sensitive military installations—"posts at which are located at lake or coast defenses"—"American citizens whose loyalty to their Government [was] unquestioned" were "permitted to visit such portions of the defenses as the commanding officer deems proper." Army Reg. Art. XXXVIII, para. 355 (1908).

occasions when an installation is open to the public. Indeed, the prohibition respondent violated has its primary application in such circumstances. There is no principled basis for distinguishing a base that is open to the public for an "open house" from one that is open for other purposes. On the contrary, as a practical matter the need for the additional protection of base security that Section 1382 provides is especially great during a military open house.

a. *i.* The legislative history of the provision that is now Section 1382 is scant but informative. The prohibition was first enacted—in a form indistinguishable, for present purposes, from the current Section 1382—as Section 45 of the Act of Mar. 4, 1909, ch. 321, 35 Stat. 1097.[7] Congress clearly envisioned at the time that the prohibition now contained in the second paragraph of Section 1382 would apply primarily to bases that are open to members of the public. Both committees that considered Section 45 ex-

[7] The original version of the statute provided as follows:

> Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

The statute was amended by the Act of Mar. 28, 1940, ch. 73, 54 Stat. 80, and was further amended to its present form by the Act of June 26, 1948, ch. 645, § 1382, 62 Stat. 765. Neither amendment altered the provision in any way material to the questions presented here. See, *e.g.*, H.R. Rep. 304, 80th Cong., 1st Sess. A102 (1947); S. Rep. 739, 76th Cong., 1st Sess. (1939); H.R. Rep. 1752, 76th Cong., 3d Sess. (1940).

plained its purposes as follows (S. Rep. 10, 60th Cong., 1st Sess. Pt. I, at 16 (1908); H.R. Rep. 2, 60th Cong., 1st Sess. Pt. I, at 16 (1908)):

> [It] is designed to punish persons who, having been ejected from a fort, reservation, etc. return for the purpose of obtaining information representing the strength, etc. of the fort, etc., or, for the purpose of inducing men to visit saloons, dives, and similar places. Such persons may now go upon forts and reservations repeatedly for such purposes and there is no law to punish them.

This statement reveals that the committees must have understood that the legislation would apply to bases that were freely open to members of the public, because the problem of "persons * * * go[ing] upon forts and reservations repeatedly for [improper] purposes" is likely to arise only when the public at large is allowed access to a base. If an installation is closed to the public—that is, if access to the base is controlled and a civilian can enter only with specific permission—the commander can simply refuse to admit "[s]uch persons" to the base; he has little need for the prohibition that is now the second paragraph of Section 1382.

The only significant floor debate on Section 45 confirms the conclusion that this prohibition was intended principally for bases that are open to the public. Representative Williams stated that the proposed legislation was intended to prevent espionage on military bases (42 Cong. Rec. 689 (1908)); Representative Moon, who introduced the legislation (42 Cong. Rec. 479 (1908)), then made the following remarks (42 Cong. Rec. 689 (1908)):

> [T]his section * * * was urged * * * by the War Department not only for the purposes enumer-

> ated [by Representative Williams], but to protect soldiers from people coming onto the reservation and taking them off to dives and illicit places surrounding the encampments. It was said to be a frequent occurrence that people would come with carriages and conveyances and time after time lure the soldiers away. They could be ordered away, but there was no law to punish them for reentering and constantly returning, and therefore they constantly defied authority by reappearing upon the reservation. Therefore this was recommended in obedience to the request of the War Department.

As a practical matter, individuals could have engaged in the practices Representative Moon described only on bases that were generally open to the public. It would be very difficult, if not impossible, for a person whom the authorities wished to exclude to reenter a base repeatedly, bringing "carriages and conveyances," unless the base were open to the general public. Thus Representative Moon also plainly envisioned the prohibition at issue here as a means of aiding commanders in their control of access to bases that were generally open to members of the public.[8]

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[8] In addition, respondent has repeatedly asserted (J.A. 28-29, 38-39; Appellant's C.A. Br. 20-24; Br. in Opp. 4, 9-10, 32) that even before the open house, he reentered Hickam on several occasions in violation of the bar letter; respondent appears to contend that this conduct—which no military official ever countenanced—somehow earned him immunity from prosecution under Section 1382. But Representative Moon's remarks suggest that Section 1382 was intended to deal with individuals who engage in precisely the conduct to which respondent admits: "constantly def[ying] authority" by "reappearing upon the reservation," and "constantly returning," notwithstanding his bar orders, "time after time."

ii. The structure of Section 1382 confirms what is evident from the legislative history: Congress intended the second paragraph to be invoked in situations in which members of the public are generally allowed to enter an installation, but a particular individual has acted in a way that justifies the commanding officer in ordering that he not be allowed to reenter. The second paragraph of Section 1382 would be nearly superfluous unless it were directed to situations in which the public at large is generally permitted to enter a base. The first paragraph prohibits any person from "go[ing] upon" a military installation "for any purpose prohibited by law or lawful regulation." It has been uniformly held that this provision alone is sufficient to prohibit any person from knowingly entering a base in violation of regulations that limit civilian access.[9] The second paragraph of Section 1382 is, therefore, not needed if access to a base is controlled and limited to certain categories of civilians; it is needed only if the public generally is free to enter. To limit Section 1382 to circumstances in which a base is not generally open to the public

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[9] Limitations on public access to a base are specified by regulations, which are generally issued by the base commander. The lower courts have consistently ruled that a person who knowingly enters a base in violation of such a regulation enters "for a[] purpose prohibited by" the regulation and therefore violates the first paragraph of Section 1382. See, *e.g.*, *Parrilla Bonilla*, 648 F.2d at 1377; *United States* v. *Patz*, 584 F.2d 927, 929 (9th Cir. 1978); *United States* v. *Mowat*, 582 F.2d 1194, 1203-1204 (9th Cir.), cert. denied, 439 U.S. 967 (1978); *United States* v. *Floyd*, 477 F.2d 217, 222 (10th Cir.), cert. denied, 414 U.S. 1044 (1973); *Holdridge*, 282 F.2d at 309. See also *United States* v. *Holmes*, 414 F. Supp. 831 (D. Md. 1976); *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966).

would, therefore, render the second paragraph unnecessary. Since "[t]he statute admits a reasonable construction which gives effect to all of its provisions," there is no reason to "adopt a strained reading which renders one part a mere redundancy." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); see *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 789 (1983).

Indeed, it would be peculiar to conclude that the second paragraph is designed principally to aid commanders in enforcing a general prohibition against entering a base applicable to all members of the public. The second paragraph contemplates—although it does not necessarily require—that a person will not be criminally liable until he returns to a military base for the second time after having previously engaged in some improper activity. See *Holdridge*, 282 F.2d at 308-309. But if Congress had been addressing situations in which members of the public are generally not allowed on military installations at all, it would have had no reason to treat a person who intruded on the base "like the dog with his proverbial first bite" (*id.* at 311 (in a different context)); Congress would simply have imposed criminal liability for the first entry. Congress must, therefore, have intended the second paragraph of Section 1382 to apply primarily to situations in which members of the public can lawfully enter a base unless they have been barred.

b. It is therefore entirely clear that the prohibition that respondent was charged with violating applies in —indeed, is principally intended for—situations in which a military installation is generally open to the public. There is no basis for distinguishing an "open house" from other such situations. Nothing in the language of the statute itself would remotely support

such a distinction. And as a practical matter, the need for prohibitions like Section 1382 is more, not less acute during an open house than when a base is generally open to the public.

Military installations are not closed gratuitously; the military generally permits the maximum degree of openness to the public that is consistent with the needs of military discipline and security. The nature of the operations and equipment at some installations permits a high degree of public access: the gates may be left permanently unguarded, and the public may be allowed to enter any unsecured area at any time. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 830 (1976) (describing Fort Dix, New Jersey); *Flower* v. *United States*, 407 U.S. 197, 198 (1972) (describing Fort Sam Houston, Texas). At other installations—including most Air Force bases—the nature of the operations and equipment precludes such a high degree of public access. It is, however, usually possible to set aside one day on which special security precautions can be taken and the public can be invited for an open house to certain (although not all) areas of the base.

Thus, in both the case of a normally "closed" base on the day of an open house and the case of a base that is routinely open, the military has balanced the interest in openness against the particular security needs of the base. And in both instances, those security needs remain substantial; indeed, the fact that a base is normally closed means that special precautions are required during an open house. Accordingly, there is no reason to believe that Congress would have intended certain protections—such as Section 1382—to apply to one situation but not the other. Since, as we have shown, Congress plainly intended Section 1382 to apply to bases that are routinely open, it must have intended that statute to apply to open houses as well.

In addition, any attempt to distinguish between "open houses" and other situations in which a base is open to the public would encounter serious line-drawing problems. It is not uncommon for the military to permit members of the public to enter otherwise closed areas for specific purposes, such as to attend a ceremony or an exhibition. Hickam itself, for example, will sometimes allow civilians to enter for "special events" such as weddings, parties, and sports tournaments. See 15th Air Base Wing Reg. 125-4, paras. 4.b(3), 4.c(3) (20 Oct. 1979). If Section 1382 were held not to apply to open houses, questions would immediately arise over whether the holders of bar letters must also be allowed to enter the base during other events and ceremonies that arguably bear some resemblance to open houses. There is no reason to believe that Congress intended distinctions of this kind to be drawn. On the contrary, every indication of legislative intent points toward one conclusion: Congress intended to prohibit the reentry of any person who has been ordered not to reenter, irrespective of the extent to which the general public is permitted on the base.

Finally, as a practical matter, the reasons for enforcing the prohibition against reentry are substantially stronger during an open house on an otherwise closed base. As we have noted, the decision of the Air Force to close Hickam to members of the general public except on the day of the open house reflects a judgment that the base is a sensitive area in which security is especially important. While the most sensitive portions of the base remain closed even during an open house, it is generally easier for a person to gain access to them once he has entered the base.

Moreover, the large number of strangers who enter the base during an open house provide cover for any individual who seeks to engage in destructive activities. At the same time, the base security staff will generally be preoccupied with duties arising out of the open house and will be less able to protect against such threats. For these reasons, the need to prohibit the reentry of persons who, like respondent, have proven themselves to be threats to the security and good order of an installation is enhanced—not diminished—during an open house at an installation that is usually closed to the public.

II. THE FIRST AMENDMENT DOES NOT PROHIBIT THE ENFORCEMENT OF SECTION 1382 AGAINST RESPONDENT

The court of appeals' preoccupation with the question whether Hickam was a "public forum" during the open house led it to commit a fundamental error. The court approached this case as if the fact that respondent had received a bar letter was of secondary significance and the principal issue was whether the commander of Hickam could exclude all demonstrators during an open house. For example, after a lengthy discussion the court of appeals announced (Pet. App. 13a): "We conclude that members of the public had a first amendment right to hold signs and pass out leaflets at Hickam Field on Armed Forces Day."

But whether members of the public can demonstrate at Hickam during an open house is not the issue in this case at all. Respondent was not an ordinary member of the public, and he was not charged with participating in a demonstration; unlike other members of the public, he had received a bar letter, and he was not prosecuted for any form of commu-

nication but simply because he reentered the base in violation of Section 1382. Thus the only question in this case is whether the First Amendment forbids the government from enforcing the prohibition contained in the second paragraph of Section 1382—a content-neutral prohibition that is wholly unrelated to the regulation or suppression of speech—against respondent, an individual who was barred from Hickam because he had engaged in acts of vandalism. This Court's decisions leave no doubt what the answer to that question must be.

A. 1. From the earliest days of the Republic, commanding officers have possessed, and exercised, the authority to exclude civilians from the area of their command. As this Court has stated, an opinion issued by Attorney General Butler in 1837 reveals that this prerogative "was even then of long standing." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 892 (1961); see *id.* at 893, quoting 3 Op. Att'y Gen. 268, 269 (1837). The commanding officer's authority to control access to his base has been repeatedly and consistently recognized since then. See *Cafeteria Workers*, 367 U.S. at 893, citing, inter alia, 26 Op. Att'y Gen. 91, 92 (1906); Brief for the Respondents at 37-55, *Cafeteria Workers* v. *McElroy*, *supra* (No. 97, 1960 Term).[10] Indeed, the Court has described this authority as "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command" (*Cafeteria Workers*, 367 U.S. at 893; see *Greer* v. *Spock*, 424 U.S. 828, 838 (1976)). While a commanding officer is not free to exercise this power arbitrarily or for unconstitutional purposes (see pages 27-28, *infra*), there is, as

[10] We have served a copy of this brief on counsel for respondent.

we have noted, no doubt that respondent was properly barred from Hickam for his previous acts.

By enacting the second paragraph of Section 1382, Congress provided a criminal sanction to support the exercise of the commanding officer's authority to exclude persons from the base. As the legislative history of Section 1382 shows (see pages 14-16, *supra*), Congress became aware that commanding officers' orders were being flouted with impunity, and it enacted Section 1382 so that those orders could be enforced.

The court of appeals declared unconstitutional the application of this Act of Congress and, by necessary inference, an exercise of the "historically unquestioned" authority of Hickam's commander. But little of the court of appeals' opinion is devoted to an assessment of the interests underlying either this traditional military authority or the supporting statutory enforcement mechanism enacted by Congress. Indeed, the court of appeals gave only cursory treatment to the fact that respondent had been barred from the base by the commanding officer and that his act of reentry violated an Act of Congress and was the sole basis of the criminal charge against him.

Instead, the court of appeals focused its attention on the theoretical question of the degree to which the open house at Hickam could be characterized as a "public forum." In our view, the court of appeals' conclusion that Hickam was some variety of public forum during the open house is, at the very least, open to serious question.[11] But whether Hickam dur-

[11] Under *Greer* v. *Spock*, *supra*, a demonstration like that of respondent's companions would not be constitutionally protected even on a military base that is generally open to the public. As the Court has recently reaffirmed, a military base "does not become a 'public forum' simply because members of

ing the open house was a public forum is immaterial to the correct resolution of this case; even if we as-

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the public are permitted to come and go at will." *United States* v. *Grace*, 461 U.S. 171, 177 (1983), citing *Greer*, 424 U.S. at 836.

The court of appeals distinguished *Greer* principally on the ground that the nature of the open house was such that "[i]f the Air Force had intended to make Hickam into a public park or fairgrounds for a day, it would have done little more" (Pet. App. 9a); public parks and fairgrounds are generally regarded as public forums. The court of appeals also found it significant that "one of the purposes of the [open house] was to present the military's view in the current arms debate [and] to show the public that its money is being used efficiently" (*ibid.*) and that respondent's "expression, like that of the Air Force, was directed primarily toward the non-military public" (*ibid.*).

We note first that the court of appeals did not identify any basis for its factual assertions about the resemblance between the open house at Hickam and "a public park or fairgrounds." The district court did not make findings of fact on the precise nature of the open house, and the extent to which the open house at Hickam resembled a fairgrounds or park was not a focus of the litigation in the district court. Air Force regulations in effect at the time of the 1981 open house specifically required base commanders not to "turn [open houses] into fairs, circuses, civilian air shows, or a medium for display of commercial products." A.F. Manual 190-9, para. 4-6.b(4) (22 Sept. 1972). The regulations now in force do the same. See A.F. Reg. 190-1, para. 4-29 (16 Feb. 1982, as amended 28 June 1983). Government officials are presumed to comply with regulations in the absence of contrary evidence. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926). The court of appeals therefore had no warrant for predicating its analysis on the view that the Air Force did all it could to convert Hickam into a fairground on the day of the open house.

Moreover, even if the areas of Hickam in which the open house occurred took on some of the attributes of a public park

sume arguendo that Hickam was a public forum during the open house, the enforcement of Section 1382

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or fairground, it does not follow that the base lost its essential character as a military installation—any more than the generally open nature of the base involved in *Greer* caused it to lose its essentially military character. Indeed, there is a pronounced inconsistency between the court of appeals' assertion that the Air Force effectively "ma[d]e Hickam into a public park or fairgrounds for a day" and its emphasis on the fact that the Air Force was using the open house to convey information about its mission. The open house was held at Hickam to serve certain military purposes (see pages 38-39 & note 17, *infra*), even if those purposes were different from training or target practice.

In addition, permitting political demonstrations on a military installation, even during an open house, risks jeopardizing the vital interest in protecting "the military * * * from both the reality and the appearance of acting as a handmaiden for partisan political causes" (*Greer*, 424 U.S. at 839). Of course, it is unlikely that anyone would conclude from the Air Force's tolerance of a demonstration like that conducted by respondent's colleagues that the Air Force approved their views. But "it is evident * * * that the validity of [a prohibition] need not be judged solely by reference to the demonstration at hand. Absent the prohibition * * *, there would be other groups who would demand permission to deliver an asserted message by" demonstrating during an open house. *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 8 (citation omitted). If open houses are treated as public forums, base commanders will potentially be required to allocate time, space, and police protection between, for example, groups that favor certain military expenditures or activities and those that advocate a different view. It is not difficult to see how casting the base commander in the role of referee between groups of demonstrators who favor opposing interests and seek to propagate their views on a military base would lead to the appearance of military entanglement in politics.

Finally, the court of appeals erred in reasoning that demonstrations by private citizens must be allowed at the open house

against respondent did not violate the First Amendment.

2. a. It would not be an overstatement to say that the First Amendment has essentially no bearing on this case at all. Section 1382, as applied to respondent, is a neutral measure that is unrelated to the suppression or regulation of speech: it makes no reference to the content of speech or indeed to whether speech has ever occurred at all. To be sure, if an individual were charged with a violation of Section 1382 on the basis of a bar letter he received for engaging in protected expressive activities, that application of Section 1382 might be said to involve a speech-

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because the Air Force itself was "speaking" and promoting a certain view. It is a legitimate function, and a responsibility, of government agencies to explain and justify their programs to the public. See pages 38-40, *infra*. Government spokesmen routinely issue statements and hold press conferences for this purpose. It is implausible to suppose that whenever the government uses a facility it owns to explain or justify its activities to the public, it incurs an obligation to make that facility available to persons who wish to express an opposing view. If this were true, " 'display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician' " (*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981), quoting *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)). For example, if Air Force officials held a press conference in a government auditorium at which they tried to portray the Air Force in a favorable light, respondent surely could not claim a constitutional right to speak in the same auditorium to express contrary views. Similarly, even if the Air Force invited members of the public to Hickam in order to give an accounting of how it was using taxpayers' money, that did not obligate the Air Force to permit others to use Hickam simultaneously to present differing views.

related prohibition. See pages 35-36, *infra*, discussing *Flower* v. *United States*, 407 U.S. 197 (1972). But respondent does not contend, and cannot possibly contend, that he received his bar letter for engaging in activity protected by the First Amendment; he received it for destroying government property, an act for which he was convicted of a crime.

Of course, a person subject to a bar letter may challenge the letter in a proper action for declaratory relief.[12] If his claim is that the bar order is unconstitutional, he may, under this Court's decision in *Flower* v. *United States*, *supra*, raise its invalidity as a defense to a prosecution under Section 1382. Cf. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). A bar letter cannot be issued in retaliation for the exercise of rights protected by the Constitution or for the purpose of preventing a person from exercising those rights. See *Cafeteria Workers*, 367 U.S. at 897-898. A bar letter issued for such an impermissible purpose cannot support a conviction under Section 1382. Moreover, Department of Defense regulations specifically provide that a base commander may not exercise his authority to deny access to the base "in any arbitrary, capricious, or discriminatory manner" and that this authority must be "judiciously applied" on the basis of "reasonable grounds" (DOD Directive No. 5200.8, para. C (July 29, 1980)). Air Force regulations further specify that a bar order "must be reasonable in relation to [the commander's] responsibility to protect and to

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[12] In order to bring such an action, an individual would have to exhaust his administrative remedies by appealing to the commanding officer of the base and, of course, show that his claim presented a justiciable case or controversy.

preserve order on the installation and to safeguard persons and property thereon." A.F. Reg. 355-11, para. 1.b (10 Sept. 1971). See *Serrano Medina* v. *United States*, 709 F.2d 104, 109-110 (1st Cir. 1983); *Bridges* v. *Davis*, 443 F.2d 970, 973-974 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972); Lloyd, *Unlawful Entry and Re-entry into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 Mil. L. Rev. 137, 150-152 (1971). Thus the holder of a bar letter may challenge it either on the ground that its issuance violated the First Amendment or on the ground that it was arbitrary and capricious. But as we have noted, respondent has not raised, and would have no basis for raising, such a claim in this case.

Just as the issuance of the bar order to respondent did not implicate the First Amendment, so the enforcement of the order through Section 1382 is wholly unrelated to the regulation or suppression of speech. Specifically, it is immaterial that respondent's reason for defying the bar order was that he wished to accompany demonstrators onto the base; Section 1382 prohibited respondent from reentering Hickam irrespective of whether the purpose of this reentry was to engage in expressive activity. There is no showing that respondent was singled out for prosecution because he was associated with persons engaged in a demonstration—much less because of the particular views of the demonstrators. In all of these respects, the First Amendment is not implicated in this case at all.

b. The enforcement of Section 1382, by precluding respondent from reentering Hickam, did, of course, have the necessary effect of preventing respondent from engaging in expressive activities within the

boundaries of the base. But this circumstance alone does not give rise to a substantial First Amendment claim. Respondent's reentry onto the base violated a neutral prohibition unrelated to speech; an individual in respondent's position should not be allowed to escape criminal liability merely because, while committing the unlawful act of reentering the base, he also takes care to engage in expressive activities. Moreover, unlike many restrictions on expression that this Court has upheld,[12] the prohibition that respondent violated was not unilaterally imposed on him by the government; by deliberately committing the acts of vandalism that caused him to be barred, respondent was himself responsible for any limitation that was placed on his subsequent ability to engage in expressive activities at Hickam. It is not unconstitutional for Congress to authorize the Air Force to insist that a person may not engage in acts of vandalism on a base if he wishes subsequently to use the base as a forum for political expression.

3. If the enforcement of Section 1382 against respondent implicated First Amendment concerns at all, the most that can be said is that it imposed an "incidental limitations on [respondent's] First Amendment freedoms" (*United States* v. *O'Brien*, 391 U.S. 367, 376 (1968)). This by itself, of course, does not draw into question the constitutionality of Section 1382. "[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places" (*Members*

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[12] See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984); *Members of the City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

of the City Council v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 22). As the Court has said in the specific context of a military base, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however they please.'" *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966).

Thus, even when a public forum is involved, this Court "'ha[s] often approved restrictions * * * provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.'" *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). In *United States* v. *O'Brien*, *supra*, the Court formulated the test as follows (391 U.S. at 377):

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

However the test is formulated, it is easily satisfied by Section 1328.[14]

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[14] The three-part test stated in *Heffron* is generally applied to regulations of the time, place, and manner of speech in a public forum. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972). But as the Court has made clear, time, place, and manner restrictions are one category of the incidental restrictions addressed by *O'Brien*, and the *Heffron* and *O'Brien* tests are essentially equivalent. See, *e.g.*, *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 10 & n.8; *id.* at 8 n.6 (Marshall, J., dissenting). See also *Members of the City Council* v. *Taxpayers for Vincent*, No. 82-975 (May 15, 1984), slip op. 14, 17-18.

a. The first element of the *O'Brien* standard requires that Congress have the constitutional authority to enact the measure that imposes an incidental restriction on expression. Of course, "[t]he control of access to a military base is clearly within the constitutional powers granted to both Congress and the President." *Cafeteria Workers*, 367 U.S. at 890. As we have explained, Congress enacted Section 1382 in order to protect the security of military installations and to ensure that their ability to carry out their mission would not be jeopardized by the actions of intruders. See pages 14-16, *supra*. Not only does Congress have the constitutional authority to enact legislation for such purposes (see U.S. Const. Art. I, § 8, Cls. 12-14; *Greer*, 424 U.S. at 836-840; *Cafeteria Workers*, 367 U.S. at 890) but that constitutional authority is unusually "broad and sweeping" (*O'Brien*, 391 U.S. at 377; see generally *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981)).

b. The second element specified by *O'Brien*—and echoed by the test applicable to time, place, and manner restrictions on expression in a public forum—is that the government interest be substantial. In a narrow sense, the interest promoted by enforcing Section 1382 against respondent is the obviously substan-

tial interest in preventing a person who has proven himself to be a threat to the security of a military installation from obtaining another opportunity to destroy government property.

But the constitutionality of enforcing Section 1382 is not limited to cases in which the recipient of a bar letter has previously destroyed government property. The government has a substantial interest in enforcing *any* reasonable bar order issued by a base commander. The extraordinary historical pedigree of the base commander's authority to exclude persons from the area of his command itself testifies to the importance of this interest. In addition, Congress cannot be expected to catalogue, ahead of time and with precision, all of the various causes that might justify barring an individual from a military installation. Not only would it be impossible for Congress to anticipate every contingency that might arise, but distinctively military concerns must inform the decision whether an individual has proved himself to be a threat to the security and good order of a base. As the Court has often recognized:

> [T]he military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

Parker v. *Levy*, 417 U.S. 733, 743 (1984), quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); see also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 367 (1976), quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). A base commander is in the best position to understand the extent to

which particular acts by a civilian are inconsistent with the mission of his base and its specialized needs and to determine whether a bar order is warranted.

c. The third element of the *O'Brien* standard is that the measure in issue be supported by interests "unrelated to the suppression of free expression" (391 U.S. at 377). As we have explained, Section 1382 plainly satisfies this requirement. Respondent did not receive a bar letter for engaging in activities related to expression, and he violated Section 1382 by reentering the base irrespective of whether his reentry was for the purpose of engaging in a political demonstration.

d. The final element of the *O'Brien* test is that "the incidental restriction on alleged First Amendment freedom" be "no greater than is essential to the furtherance of [the government's] interests" (391 U.S. at 377). The court of appeals did not explicitly attempt to apply either the *O'Brien* criteria or any other test to Section 1382, but it does appear that the court —while acknowledging that Section 1382 is necessary in many contexts to protect the government's interest in ensuring the security of military installations— believed that the government's interests would not be prejudiced if Section 1382 were not to apply during military open houses. See Pet. App. 14a.

The first difficulty with the court of appeals' view is that it is based on a misunderstanding of the practicalities of administering a military open house. As we have noted, it is generally *more* difficult to maintain security during an open house, and therefore more important that the commanding officer be able to exercise his "historically unquestioned power * * * to exclude civilians from the area of his command" (*Cafeteria Workers*, 367 U.S. at 893). The large crowds of unfamiliar persons present at an open

house increase the difficulty of maintaining the security of the base; a person determined to engage in, for example, the kind of conduct for which respondent received a bar letter—acts of malicious mischief in sensitive areas of the base—can use the crowds as cover for both his movement through the base and his escape. When only the most sensitive areas of the base are closed, it is easier for an individual to gain access to them than it is when the entire base is closed and any crossing of its boundaries will be monitored. Finally, during an open house the base security staff is stretched thin and assigned unaccustomed responsibilities. This, too, would make it easier for a person who has already proved himself to be a threat to the good order of the base to engage in improper activities.

A more fundamental difficulty with the court of appeals' approach is that Congress and the Air Force, not the court of appeals, are responsible for determining the extent to which base security requires that persons who have justifiably been barred from the base continue to be excluded during an open house. The court of appeals' conclusion "represent[s] no more than a disagreement with the [Air Force] over how much protection the [base] require[s] or how an acceptable level of [security] is to be attained." *Clark* v. *Community for Creative Non-Violence*, No. 82-1998 (June 29, 1984), slip op. 11. Since the enforcement of Section 1382 unquestionably "will avoid a measure of * * * threatened damage" to the security of the base (*ibid.*), the Air Force is entitled to enforce it in appropriate cases.[18]

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[18] We note, in addition, that respondent has "substantial alternative" means of expressing his views (*Perry Education Ass'n*, 460 U.S. at 53). He has the same rights as any other member of the public, for example, to engage in a demonstration just outside the gate of a military installation. This is comparable to the alternatives that the Court has considered adequate in other cases. See *id.* at 53-54 (citing cases).

B. In concluding that respondent's bar letter did not affect his right to enter the base during the open house, the court of appeals relied almost exclusively on *Flower* v. *United States*, 407 U.S. 197 (1972). But *Flower* stands only for a proposition we have acknowledged: a person cannot be prosecuted under Section 1382 on the basis of a bar letter that was issued because he engaged in constitutionally protected activity. This principle is of no help to respondent, whose bar letter was unquestionably valid and was issued for reasons unrelated to expression.

Flower was "distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston, San Antonio, Texas" (407 U.S. at 197). This street, and the installation, were open to the public at all times (*id.* at 198). Flower had previously received a bar letter, and he was prosecuted and convicted under Section 1382. This Court ordered that his conviction be set aside.

But Flower, unlike respondent, had received his bar letter for engaging in the same activity he was engaged in when he was arrested—leafleting on the open base. See 407 U.S. at 197; *United States* v. *Flower*, 452 F.2d 80, 82, 87 (5th Cir. 1971). The Court determined that, in the context of the military base at issue in *Flower*, this activity was constitutionally protected (407 U.S. at 198-199). Since the bar letter had been issued because Flower engaged in protected activity, Flower's conviction was reversed.

By contrast, as we have noted, there is no suggestion, and there can be no suggestion, that respondent received a bar letter for engaging in activities protected by the First Amendment. It is wholly implausible to suppose, as the court of appeals did (see Pet. App. 13a), that *Flower* establishes that once a base commander permits members of the public to enter his base in large numbers, he loses all authority to exclude any person, no matter how justifiable—and unrelated to speech or expression—his reason for doing so. See *Greer*, 424 U.S. at 838 n.10. In particular, we think it clear that the decision in *Flower* would not have been the same if Flower had received his bar letter for espionage, for distributing narcotics to servicemen—or for destroying military files.

Flower is unlike this case in another respect, as well. In *Greer* v. *Spock*, *supra*, this Court admonished that it is a "mistake[]" to conclude that *Flower* stands for the principle that "whenever members of the public are permitted freely to visit a place owned or operated by the Government," they may also freely exercise the right to demonstrate and pass out leaflets in that place. 424 U.S. at 836. Instead, the Court explained, "[t]he decision in *Flower* was • • • based upon the Court's understanding that New Braunfels Avenue was a public thoroughfare in San Antonio no different from all the other public thoroughfares in that city" (*id.* at 835). Indeed, as the Court noted in *Greer*, *Flower* "rested upon the premise that 'New Braunfels Avenue was a completely open street' and that 'the military ha[d] abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue.'" *Ibid.*, quoting *Flower*, 407 U.S. at 198.

In this case, whatever the merits of the court of appeals' conclusion that Hickam became a "public forum" during the open house—and as we have noted, we consider that conclusion to be highly questionable (see pages 23-26 note 11, *supra*)—it cannot possibly be claimed that the Air Force abandoned any claim of special interest in what occurred during the open house. If the Air Force had simply donated portions of Hickam to a private organization for a day for the purpose of allowing that organization to conduct a fair or carnival, it might have created a situation like that in *Flower*. But all portions of Hickam remained a military base, dedicated to a military mission, not only before and after but during the open house. The open house was held for the purpose of informing members of the public about the Air Force and about Hickam, and of alleviating the isolation of the base from the surrounding community. See pages 38-40, *infra*. These are military functions—functions that are perhaps less vital than basic training, for example, but nonetheless important functions that are properly performed by the military. See *Persons For Free Speech at SAC* v. *United States Air Force*, 675 F.2d 1010, 1016 (8th Cir.) (en banc), cert. denied, 459 U.S. 1092 (1982) ("While the primary mission of the Air Force may be the defense of the United States, this does not mean that good relations between a military base and the community in which it exists is not legitimately supportive of that mission."). Accordingly, there is no basis for regarding Hickam during the open house as the equivalent of New Braunfels Avenue, "a public thoroughfare • • • no different from [any] other" (*Greer*, 424 U.S. at 835), or as comparable to "a public park or fairgrounds for a day" (Pet. App. 9a).

C. The irony of the court of appeals' approach is that if it were to prevail, it would threaten to disserve, rather than promote, First Amendment values. Military open houses—which are common [16]—serve a variety of worthwhile purposes, such as promoting good relations between the military base and its surrounding community and making the community aware of the public services that the base can offer. But beyond that, it promotes First Amendment values for the government to communicate with its citizens. One of the primary responsibilities of the government in a democratic society is to inform citizens of its activities so that they may evaluate its performance.[17] See *Barr* v. *Matteo*, 360 U.S. 564, 575-575 (1959) (plurality opinion of Harlan, J.); *id.* at 577 (Black, J., concurring). Such communications serve the very First Amendment interests that respondent and the court of appeals invoke. See T. Emerson, *The System of Freedom of Expression* 698 (1970) ("Participation by the government in the system of freedom of

[16] The Air Force has issued a directive urging every base commander to hold an open house at least annually. A.F. Reg. 190-1, para. 4-29 (16 Feb. 1982, as amended 28 June 1983). See also A.F. Reg. 190-9, para. 4-6.b(4) (22 Sept. 1972) (regulation in effect in May 1981).

[17] The Air Force regulations that govern open houses specify that their purpose is "to report to the American public, emphasize and explain the mission, equipment and facilities, people, skills, and professionalism required of the Air Force." A.F. Reg. 190-9, para. 4-6.b(4) (22 Sept. 1972) (in effect in May 1981); see A.F. Reg. 190-1, para. 4-29 (16 Feb. 1982, as amended 28 June 1983). See *Persons For Free Speech at SAC*, 675 F.2d at 1017: "The governmental interest which is served by the open house * * * is that the government is showing its citizens, who pay for the military, how it is spending their money."

expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade * * *. Government participation also greatly enriches the system; it provides the facts, ideas, and expertise not available from other sources.").

It is, moreover, particularly vital that these lines of communication be kept open in the case of the military. Precisely because the military "is, by necessity, a specialized society separate from civilian society" (*Parker* v. *Levy*, 417 U.S. 733, 743 (1974)), it is important for the government to attempt to ensure that the military and civilian communities not become isolated from each other to a degree that is excessive and problematic. As we have noted, many military installations are open to members of the public, who can freely enter unrestricted areas. But where, as is typically the case on Air Force bases, security needs make this impractical, the open house program is a principal means of alleviating the mutual isolation of the military and civilian communities.

It is natural for the military, when presenting itself to the civilian public at an open house, to attempt to create a pleasant atmosphere and to portray itself in a favorable light. At the same time, the military is of course fully prepared to respect the First Amendment rights of those who attend open houses, although we do not necessarily agree with the court of appeals' assessment of the scope of those rights. But no commander can responsibly tolerate a threat to the security of the base. As we have noted, any open house necessarily increases security risks to some degree; persons with free access to the open areas of the base will find it easier to reach the se-

cured areas, and the crowds of civilians can provide cover for unlawful activities. The court of appeals' holding, if it were to prevail, would augment these problems by denying to base commanders the authority to exclude from the open house persons whose previous conduct has proven them to be threats to the security and good order of the base. For these reasons, the court of appeals' decision not only is without support in First Amendment principles; it unjustifiably burdens the government's efforts to carry out a worthwhile program that, by enhancing communication and understanding between the military and civilian communities, itself furthers First Amendment values.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JAMES VINCENT ALBERTINI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Did respondent's conviction under 18 U.S.C. § 1382 for attending an Armed Forces Day open house exceed statutory authority or violate the Due Process Clause where (a) respondent's bar letter was issued nine years earlier, (b) the military invited the general public onto the base for educational, entertainment, and public relations activities put on for the public's benefit, and (c) respondent, under all the circumstances, reasonably believed that the bar letter did not apply?

2. Did respondent's conviction violate the First Amendment where (a) respondent's only conduct was entrance to and peaceful presence at an Armed Forces Day open house which was designed for and dedicated to expressive activities and (b) respondent's removal and prosecution were precipitated solely by his association with the peaceful expressive activity of others?

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IN THE

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BRIEF FOR THE RESPONDENT

STATEMENT

This case concerns a criminal conviction for peaceful entry onto and presence within Hickam Air Force Base during the base's annual open house on Armed Forces Day—precisely the same activity which thousands of other individuals were concurrently engaged in, at the public invitation of the base commander. The relevant facts, some of which are omitted from and others of which differ from the government's recital, are as follows.

On May 16, 1981, Hickam Air Force Base held its 32nd annual "Armed Forces Day Joint Service Open House." J.A.

44-48.[1] The general public was widely apprised of the event through announcements distributed by Hickam's Public Affairs Division to Honolulu's major newspapers, which stated:

> While Hickam is normally a closed base, the gates will be *open to the public* for this 32nd Annual Armed Forces Day Open House. The theme this year is 'U.S. Armed Forces—Strong and Ready.'[2]

Similarly, radio spot announcements prepared by Hickam authorities conveyed the open public flavor of an event designed for the public by announcing, "the public is invited and it's all free." J.A. 48.

Hickam's open house was "authorized [and] encouraged" by the Air Force's own policy to "inform the public on Air Force preparedness and promote national security, . . . develop public understanding of the Air Force mission . . . [and] aid community relations." AFR 190-5(3)(a) (March 18, 1970).[3] As petitioner concedes, the open house was held "for th[e] benefit" of the general public, and *not* the benefit of the servicemen at the base. Pet. 3; *see also* U.S. Br. 38-39.[4]

1 Air Force Regulations provide that "Armed Forces Day (3rd Saturday in May) will be treated as a national holiday." AFR 190-5(2)(o)(2) (March 18, 1970).

2 J.A. 45 (emphasis added). Another release stated: "Hickam, normally a closed base, will be *open to the public* for the Armed Forces Day Open House." J.A. 47 (emphasis added).

3 Significantly, the two Air Force regulations covering open houses in effect at the time were AFR 190-5, entitled "Air Force Participation in Public Events," and AFM 190-9 (September 22, 1972), entitled "Information Policies and Procedures." An "Open House Checklist" from the latter, indicating the broad communicative purpose of the open house, is set out *infra* as an addendum.

4 As the public invitations indicated, the open house featured a variety of activities designed to attract, educate, and gratify the public, and generally to communicate to the public the Air Force's "theme . . . United States Armed Forces—Strong and Ready." These activities included "top local, country and western, and military entertainment," more than thirty aircraft on display for visitors to inspect (and, in some cases, enter), police dog

Respondent James Albertini is a resident of Hawaii with deeply held, religiously motivated beliefs that aspects of United States military policy are unwise and immoral.[5] With four friends, respondent openly entered Hickam's open house in the same manner as the 50,000 other attendees. He wanted

> to be involved in a peaceful legal nondisruptive demonstration of the free speech activities concerning the nuclear arms race and specifically to address Hickam's role in that, and the question of an open house where taxpayers' funds are used for this extensive display . . . .[6]

Respondent and his companions believed, accurately, that the military's purpose for the open house was "to put across one particular aspect of concerns regarding military activity, and we felt that an alternative view ought to be expressed."[7]

It is undisputed that Mr. Albertini's presence at the Hickam open house was intended to be, and was, wholly peaceful and nondisruptive. Pet. App. 3a; *see, e.g.*, J.A. 19-20, 25, 27-28.

demonstrations, aerial shows, a Marine Corps exhibit, an historical exhibit, a special "Air Force Hawaii Youth Festival" with "carnival rides, games, and a midway" for younger Hawaiians, and a competition for "Youth Festival Queen." Pet. App. 2a. *See also* J.A. 44-47, 54, 57-59 (photographs). An article in the *Honolulu Sunday Star-Bulletin & Advertiser*, May 17, 1981, at A-10, reporting on the open house at Hickam, described it as follows: "Children turned assault amphibian personnel carriers into jungle gyms, straddled torpedoes as if they were bucking broncos, blasted one another with 50-caliber machine guns and sat in the cockpit of a jet that zooms faster than Mach 2."

The program appears to have violated regulations prohibiting turning Armed Forces Day Open Houses into "fairs [and] circuses." AFM 190-9, § 4-6(b)(4) (September 22, 1972).

5 Respondent is a member of Catholic Action of Hawaii and a previous litigant in this Court. *See Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

6 J.A. 27-28.

7 J.A. 28. This belief was based, in part, on respondent's peaceful attendance at open houses held at other bases subsequent to 1972, none of which had resulted in his arrest or prosecution, J.A. 28, 37-38.

Mr. Albertini took photographs of the displays set aside for the civilians attending the open house (J.A. 25), such as the B-52 whose bomb bay Hickam's authorities invited children to walk through (J.A. 18, 57-59), and engaged in other conduct indistinguishable from the activities of thousands of other participants. J.A. 12, 25, 32-33.[8] The government does not suggest that he violated any rules, orders, or laws at the open house in any respect, except by his mere presence in light of 18 U.S.C. § 1382.[9]

Talking peacefully to people approaching to chat, Mr. Albertini and his companions were on the base for approximately forty minutes before their apprehension by Major Claude Jones, Chief of Security Police at Hickam, and subsequent detention. The contemporaneous Incident Report prepared by Hickam security discloses, and the court of appeals concluded (Pet. App. 14a), that these arrests were prompted solely by the base commander's specific concern with the First Amendment activity engaged in by respondent's companions, *not* with enforcement of § 1382 or base security.[10] This was confirmed by the testimony of the defendant (J.A. 36) ("It was only in the

8 Photographs of the open house taken by Mr. Albertini are in the record, and demonstrate the carnival-like atmosphere. J.A. 32-33, 57-59.

9 Mr. Albertini's companions (but not Mr. Albertini) held a banner reading "Carnival of Death" beside the B-52, and passed out leaflets criticizing the arms race. J.A. 12, 25; U.S. Br. 4. Ironically, the B-52 had a skull and cross bones similar to that painted on the banner. J.A. 33. Apparently, civilian leafletting and banner-carrying were not prohibited (*see* J.A. 12; *see also* Pet. 13, U. S. Reply Mem. 3); in any event, notwithstanding the court of appeals' dicta to the contrary (Pet. App. 11a), the United States concedes that respondent was doing neither. U.S. Br. 4. *See, e.g.*, J.A. 12, 25.

10 "Major Jones/CSP radioed this office at 1305, 16 May 81, and related that there were two personnel at the Armed Forced Aircraft Exhibit carrying a protest sign against the arms race. Colonel Yee on scene. A total of five individuals were involved. Two holding a banner reading 'Carnival of Death' and 'End the Arms Race.' Three others handing out flyers sponsored by Catholic Action of Hawaii. Major Jones asked for a patrol to stand by the entrance to the 19 Rov, Aircraft static display, to escort the individuals off

base security office after I would say an hour or so that the issue of a bar letter came up") and generally, with some contradiction, by Major Jones.[11]

That respondent's apprehension and expulsion occurred because of the "anti-defense" character of his views and those of his companions, and not because he entered in violation of his bar letter, is further confirmed by the military's identical treatment of his companions. Although there was no reason to believe that they had ever received bar letters from Hickam, they were apprehended with him, based on the commander's antipathy to their "anti-defense" speech, and held jointly with him at the base security office for several hours until the close of the open house. J.A. 13, 36.[12] Only after the entire group had been in custody for some time did security officials raise

the base. AIC Rothdiener dispatched, and made contact with the individuals. Upon attempting to accomplish Field Interview cards on the individuals they refused to identify themselves, at which time Colonel Parrish related via radio that if they refused to identify themselves they were to be transported to the L/E Desk and detained until properly identified." J.A. 49-50.

11 "I was summoned by the base commander to report to what appeared to be a demonstration . . . . [The Commander] noted to me that he had had reports that individuals were passing out leaflets and carrying anti-defense banners and that he wanted me to check into the matter and to have the individuals cease and desist from this activity." J.A. 8-9; *see also* J.A. 9, 11-12. Major Jones also testified that he did not believe respondent and his companions were committing any criminal act when he approached and apprehended them to terminate their expressive activity at the commander's orders (J.A. 12). Notwithstanding the clear import of the incident report and his initial testimony, Major Jones also testified, after prompting, that the Commander, contacted a second time, mentioned that one of the individuals whose leafletting he had asked security to terminate was James Albertini, who had been previously barred (J.A. 9-10). Nevertheless, Major Jones continued to make clear that the purpose of his apprehension of five individuals was the "anti-defense" leafletting and banner-displaying engaged in, not enforcement of § 1382. *See generally* J.A. 10-18.

12 Although not an issue before the Court, it would appear that this lengthy detention violated the fourth Amendment, *see United States v. Hensley*, 105 S.Ct. 675 (1985), if not also the First Amendment rights of those detained.

the issue of whether Mr. Albertini had ever received a bar letter. J.A. 36.[13]

Mr. Albertini had received a bar letter from the then-Commander of Hickam in 1972, after Mr. Albertini's misdemeanor conviction for conspiracy to injure government property, i.e., defacing military records concerning the Vietnam War.[14] Unlike similar individualized letters issued in recent years of which Mr. Albertini was aware (J.A. 30)—letters that were limited in duration to one or two years and expressly advised of the procedures available to challenge their validity (J.A. 60-62)—the pre-printed form letter Mr. Albertini received offered no hearing and did not specify the period for which it would apply.[15] From its wording it did not appear to extend past the tenure of the issuing commander.[16]

Although the district court ruled that respondent's belief that the bar letter was not applicable during the 1981 open house was irrelevant, *compare* T.82-84 *with* J.A. 41, the record demonstrates without contradiction that Mr. Albertini genuinely believed that he could attend the 1981 open house without violating his bar letter. He had several independent reasons for this belief. First, the newspaper and radio ads placed by base

13 J.A. 36. Mr. Albertini's companions had not previously been barred from Hickam. J.A. 40. Hickam did, however, issue them bar letters as a result of the incident at issue in this case, notwithstanding the Solicitor General's concession in this Court that "[a] bar letter cannot be issued in retaliation for the exercise of rights protected by the Constitution." Pet. 9-10.

14 Although petitioner departs from the record to mention an alleged March 1981 letter barring respondent from Hickam (U.S. Br. 3), this case was tried solely on the prior bar letter (e.g., J.A. 6-7). It is undisputed that respondent had never received and had no knowledge of any March 1981 letter (which does not appear in this record). *See* J.A. 28.

15 Mr. Albertini's bar letter was not individualized, but was rather simply a previously prepared form on which his name was entered. J.A. 43.

16 Construing respondent's bar letter to expire with replacement of the base commander comports with the underlying theory of the *personal* power of a base commander to exclude civilians from a base. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). The base commander who issued Mr. Albertini's 1972 bar letter was no longer in command of Hickam in 1981.

officials specifically invited the public's attendance without exception, "and as a member of the public I felt the invitation extended to me." J.A. 28-29, 37-38.

Second, Mr. Albertini believed that the bar letter had long since become stale, both as a matter of law and as a matter of fact. He did not believe that a form letter issued without notice or an opportunity for hearing, in response to a misdemeanor, could have perpetual effect, especially since recent letters issued to others of which Mr. Albertini was aware were sharply time-limited (J.A. 28, 60-62; T. 82). Moreover, it had been treated by the Hickam authorities as defunct: he had, over the years, been admitted onto Hickam on several occasions after receipt of his bar letter (without objection, and with apparent invitation) to lecture in educational extension college classes held on the base by Chaminade College as long ago as 1975-76, to attend open houses, and to conduct tours for visitors to the islands. J.A. 28-29, 37-40.[17]

Third, Mr. Albertini quite reasonably believed that a controlling decision of the local federal court precluded the government from removing an individual from a base open house for engaging in peaceful expressive activity. Mr. Albertini understood *Butler v. United States*, Civ. No. 73-3767 (D. Hawaii 1979), a civil case brought by his friends and colleagues, to hold that the military cannot punish or suppress peaceful civilian speech on a military base when the military has opened the base by inviting the entire community to a public event.[18] J.A. 29-30.

17 Respondent had also taught similar classes at Kaneohe Air Station some years subsequent to receiving a bar letter from that facility as well. J.A. 39. In addition, when Mr. Albertini entered Camp Smith in 1981, he was not prosecuted for entry in violation of a bar letter issued in 1972, or indeed even informed that he could have been. We note that his activity at that time misleadingly referred to by the government as "defacing government property" (Pet. 3) consisted of entry on Ash Wednesday, making the sign of the cross with ashes on the wall of an office on the base, reading from scripture, and singing a hymn. J.A. 30.

18 Chief Judge King's opinion in *Butler* specifically held that "the Air Force Regulations . . . relied on by the Defendants as authority to prevent

Finally, Mr. Albertini had direct experience of the Air Force's treatment of bar letters as ineffective to the extent that the general public is invited onto base property. He knew that 40 percent of the main runway at Honolulu International Airport was within Hickam's boundaries, and, of course, like many travellers to Hawaii, he had himself used it without objection. *See Airport and Airway Trust Fund: Airport Safety in the Hawaiian Islands, Hearings before the Subcommittee on Oversight of the Committee on Ways and Means*, 96th Cong., 1st Sess. 251-67 (1979) (testimony of James Albertini, including maps).

The district court convicted respondent after a bench trial without expressly considering the First Amendment issues raised, and sentenced him to three months imprisonment.[19] The court of appeals unanimously reversed. Expressly adhering to its prior opinions broadly construing § 1382,[20] the court acknowledged the military's need and broad power to protect itself from security risks (Pet. App. 14a):

> We do not by our ruling deprive the military authorities of all power to exclude individuals from military installations whenever access is offered to other members of the public. Our decision is grounded in the nature of the activities at Hickam Air Force Base on the day in question, and their effect in rendering the open portions of the facility a [temporary limited] public forum. Nor do we deal here with the exclusion of an individual whose presence constitutes a threat to the security of the military operation. The sensitive areas of Hickam were cordoned off and protected by guards. Albertini did not intrude there. His removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activity.

demonstrations did not lawfully apply at Hickam Air Force Base on the day of these incidents *because the Base was open to the public*." Findings of Fact and Conclusions of Law, at 9 (August 20, 1979). An earlier decision in *Butler*, foreshadowing that First Amendment ruling, is reported at 365 F. Supp. 1035 (D. Hawaii 1973). The case arose from a well-publicized incident in which Hickam officials invited the public onto the base for an open house to greet President Richard Nixon and to hear the President's speech, but then forcibly expelled anti-war demonstrators.

19 T. 92-98; J.A. 1. Those issues had been briefly addressed, prior to the presentation of evidence, in a memorandum order denying defendants' motion to dismiss the indictment. J.A. 63-68.

20 *United States v. May*, 622 F.2d 1000 (9th Cir.), *cert. denied*, 449 U.S. 984 (1980); *United States v. Mowat*, 582 F.2d 1194 (9th Cir.), *cert. denied*, 439 U.S. 967 (1978); *United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978).

Examining the nature of the activities offered to the public at the open house, the court of appeals noted that "if the Air Force had intended to make Hickam into a public park or fairgrounds for a day, it could have done little more." Pet. App. 9a. The court also stressed that the Air Force had a "communicative purpose" in holding the open house—namely, to present a political message to civilians, "the military's view in the current arms debate . . . the country's need for a 'strong and ready' armed force and the efficiency with which the Air Force fills that role." Pet App. 9a, 10a. Carefully analyzing this case against both *Greer v. Spock*, 424 U.S. 828 (1976), which it noted had involved speech aimed at military personnel, and *Flower v. United States*, 407 U.S. 197 (1972), the court concluded that it was far closer to *Flower*. Accordingly, without reaching the statutory and due process issues raised, the court reversed the conviction.

SUMMARY OF ARGUMENT

I. Respondent's attendance at the open house at Hickam did not violate 18 U.S.C. § 1382.

The nine-year lapse of time between the prior commander's bar letter and respondent's entry and peaceful attendance at the open house, the explicit invitation to the general public, and respondent's belief that he was authorized to attend, each distinguish respondent's conduct from that which Congress sanctioned in § 1382.

A. The government does not dispute that a bar letter may expire after a reasonable period of time. The legislative history nowhere suggests that commanders were authorized to exclude citizens for life for minor transgressions, but rather indicates that § 1382 was enacted to vindicate a commander's order to leave a base, a purpose fully served and exhausted by applying § 1382 to anyone who reenters within a reasonable period of time after being ejected. In no previous reported decision has a prosecuted reentry occurred more than a year after issuance of an order.

B. Even if the bar letter were not stale, Congress had no intention of prohibiting a "reentry" onto the base in response to an open invitation issued by a base commander to the general public to attend an open house put on for the public's benefit. The central element in the trespassory offenses against whose background § 1382 was enacted is an unwanted intrusion, requiring that the owner make clear to others that trespass will be regarded as an intrusion. Although ordinarily receipt of a bar letter communicates the required notice, the notion of "intrusion" dissipates entirely where a portion of a base is transformed into a virtual fairground, and military authorities, suspending normal base activities, invite the public to participate in activities put on for the public's benefit.

C. Finally, Congress intended to penalize "reentry" under § 1382 only where one enters a base *knowing* that his reentry is in violation of an extant order not to return, as the reported cases uniformly hold. Even if the bar letter were not stale and the general invitation did not negate the element of unwanted intrusion under the circumstances of this case, therefore, the conviction here was erroneous since Mr. Albertini reasonably believed that he was permitted to attend the open house.

II. Respondent's conviction violates the First Amendment in two independent respects.

A. The government assumes, and this Court's cases make plain, that the invitation to the general public to enter Hickam for the educational, entertainment, and public relations activities sponsored by the base was sufficient to clothe the public with a First Amendment right to attend and participate. The open house was plainly "designed for and dedicated to expressive activities", *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976), and respondent's peaceful and lawful activity at the base was plainly not "incompatible with the normal activity of [that] particular place at [that] particular time." *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring) (quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

This Court's cases provide no support for any power of officials to exclude specific individuals entirely from places open to the public for expressive activity on the basis of unbridled discretion, as here, or on the basis of unspecified past misconduct, or even on the basis of a prior misdemeanor conviction. To the contrary, precedent strongly suggests the unreasonableness of any such power *per se*. Nor are there persuasive grounds for recognizing any special power in the military to exclude selectively individuals from places like the Hickam open house through standardless discretion.

Respondent's expulsion and consequent conviction under § 1382 is not justified as narrowly tailored to serve a compelling governmental purpose, or as a reasonable time, place, or manner regulation. Even assuming the applicability of the analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), the enforcement of bar letters generally at open houses is nonetheless invalid as "greater than is essential to the furtherance of" the government's interest. The military issues bar letters quite unrelated to dangers that might arise at open houses, and measures far better fit to serve the government's legitimate interests are both available and, indeed, already in place.

B. Finally, whether or not the Hickam open house was a public forum, the court of appeals concluded and the record demonstrates that respondent was subjected to § 1382 "because the [commander] objected to what was being said . . . [and] because he disagreed with the objectives of th[e] protest." *Adderly v. Florida*, 385 U.S. 39, 47 (1966). The conviction therefore violates the central teaching of the First Amendment.

ARGUMENT

I. RESPONDENT'S ATTENDANCE AT THE HICKAM FIELD OPEN HOUSE, NEARLY TEN YEARS AFTER HE WAS "BARRED" FROM THE BASE, IN THE GOOD FAITH BELIEF THAT HE HAD NOT BEEN ORDERED NOT TO ATTEND, WAS NOT THE KIND OF "RE-ENTRY" PROHIBITED BY 18 U.S.C. § 1382

James Albertini's peaceful attendance at an "open-house" function at Hickam, to which the base commander had expressly invited all members of the general public, nearly ten years after he had received a letter from a prior commander ordering him not to return to the base, was not the sort of reentry of the base prohibited by 18 U.S.C. § 1382. Three aspects of respondent's conduct distinguish it from the kind of reentry covered by the statute: (1) the lapse of almost ten years between the order of the prior commander and respondent's attendance at the open house; (2) the particular circumstances of the open house, including the current base commander's explicit invitation to all members of the public to visit the base on that day; and (3) respondent's reasonable belief that he was authorized to attend the open house.

A. The Bar Letter Issued To Mr. Albertini In 1972 No Longer Prohibited His Attendance At The Open House In 1981

The government does "not dispute that a bar letter may expire after some reasonable period of time." (U.S. Reply Mem. 3). A review of the statutory language, the legislative history, the record of past applications of the statute, and the prevailing contemporary practice in issuing "bar letters" demonstrates that any "reasonable period of time" during which Mr. Albertini's 1972 bar letter may have been operative had long since expired by the time he attended the Hickam open house in 1981.[21]

The language of the statute, as the government emphasizes, is indeed broad, making it a crime for one to "reenter[ ]" a military installation "after having been . . . ordered not to reenter by any officer or person in command or charge thereof." 18 U.S.C. § 1382. But the government's concession that bar letters grow stale and the very breadth of the statute both show that a mechanically literal reading cannot have been intended. To take only noncontroversial examples: a literal reading of the statutory language would punish one who reentered a base at any time following a bar letter, even if the letter had subsequently been rescinded—a result Congress plainly could not have intended. At a minimum, therefore, the statute must be read as limited to punishing only those who enter a base while subject to a bar order that *remains in effect*, and has not lapsed or been rescinded or waived. Similarly, *Flower v. United States*, 407 U.S. 197 (1972), demonstrates that, despite its literal breadth, the statute applies only to reentries in the face of a constitutionally *valid* order not to return.

A strictly literal reading of the statute, then, will not do. In order to develop a more appropriate understanding of the statute, consultation of the legislative history is necessary.

Section 1382 has existed in virtually the same form since 1909. *See* Act of March 4, 1909, ch. 321, § 45, 35 Stat. 1097. The identical reports of both the House and Senate Commit-

21 The government does not deal with this contention, understandably preferring to argue that it is not before the Court (U.S. Br. 10). Clearly, however, whether an entry into a military base nearly ten years after a previous expulsion constitutes "*re*enter[ing]" within the meaning of the statute is fairly comprised within the question posed by the Court. In any event, respondent may defend the judgment below on this ground. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

tees that considered the bill made clear its limited purposes, noting that the act was

> designed to punish persons who, having been ejected from a [military installation], return for the purpose of obtaining information respecting the strength, etc., of the fort, etc., or for the purpose of inducing the men to visit saloons, dives and similar places.

H. Rep. No. 2, 60th Cong., 1st Sess., pt. 1 at 16 (1908); S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1 at 16 (1908).

The limited intention of Congress was further emphasized in the floor debates concerning the bill. Representative Williams, speaking largely to what is now the first sentence of § 1382, explained that the purpose of the bill was

> to keep out spies, and to keep out people who want to draw maps of forts and arsenals and who want to find out the sort of powder we are compounding. The object is to protect the military secrets of the Government from those in whose possession they might do harm . . .

42 Cong. Rec. 689 (1908). This was supplemented by Representative Moon, speaking to the provision involved here, who added that the bill

> was urged upon the commission by the War Department, not only for the purposes enumerated [by Rep. Williams], but to protect soldiers from people coming onto the reservation and taking them off to dives and illicit places surrounding the encampments. It was said to be a frequent occurrence that people would come with carriages and conveyances and time after time lure the soldiers away. They could be ordered away, but there was no law to punish them for reentering and constantly returning, and therefore they constantly defied authority by reappearing on the reservation.

Id.

At the most general level, it is readily apparent that respondent is not within the categories that concerned Congress: he

threatens to engage in neither espionage nor seduction of the troops to immoral pastimes. We do not suggest that the legislative history justifies reading into the statute a requirement that a defendant have a specific intent to accomplish one of the particular evil ends that Congress was specifically concerned about in 1908. The statutory language contains no such requirement, and the distinction between the first and second paragraphs of § 1382 suggests that no such requirement was intended.

At the same time, however, it is clear from the legislative history that Congress had no intention of granting to the military authorities a power to ban citizens from military bases *for life* for minor transgressions. The problem identified by the War Department, and cited by the supporters of the bill in Congress, was a limited one. While a commander could order an annoying or threatening intruder off a military reservation, the intruder, even if he had been identified as a spy, could return to his business with impunity as soon as the commander's (or his security officer's) back was turned. While the spy of course could be expelled again when apprehended, he could not be punished for returning, so that the commander's only recourse against a persistent trespasser was to keep a constant vigilance, eternally (and no doubt unsuccessfully) chasing after intruders like a cat chasing a resourceful mouse in a children's cartoon.

The remedy applied by Congress was straightforward. One who reentered the base after being ordered to leave was made punishable as a trespasser. While a literalistic reading of the statute would yield the conclusion that anyone who should ever set foot upon a base at any time subsequent to a previous occasion on which he had been "removed therefrom" could be convicted, such a broad reading of the statute does not comport with common sense, with the legislative history, military practice, or with our traditions of liberty.

A more natural reading of the statute, particularly in light of the limited problems to which it was addressed, is that it applies to anyone who reenters within a reasonable time after

having been ejected. The political demonstrators in *United States v. May*, 622 F.2d 1000 (9th Cir. 1980), are a good example. They entered the confines of a naval submarine base on May 22, 1978, to engage in a political protest; were physically removed from the base and ordered by the commander not to return; and reentered the base the very next day to stage a second demonstration in defiance of the order. Assuming the legitimacy of the initial order to depart, they fell squarely within the intention of the drafters of § 1382 to put criminal sanctions behind the commander's order to leave; in the absence of such sanctions the commander's legitimate refusal to permit them to remain on the base would have been a nullity.

Suppose, however, that one of these demonstrators had come back again to the submarine base almost ten years later, simply to visit a friend who was stationed there; or had come back only through the use of a local airport whose runways partly lay across the base. On a literal reading of the statute, he would them be committing a crime, for he had reentered the base "after having been removed therefrom or ordered not to return." But such a reading would do nothing to advance the purposes of the statute. Criminalizing a former demonstrator's return ten years after the incident is simply not necessary to vindicate the commander's former order to the marchers to leave the base; the purpose of that order had long since been served.[22]

Not only would an expansive reading of § 1382 not serve the purposes of the Congress, it would also be totally inconsistent with the liberty interests of Americans. Congress surely cannot have intended to create a class of citizens who were permanently banned from ever visiting a military base, not because they had been found after some reasonable administrative process to pose a serious threat to security, but simply because they had once been ordered to leave.[23] The

22 The objection is *a fortiori* where a new commander has replaced the old. *See supra* p. 6 n.16.

23 That the order not to return is directed to a specific individual and is reduced to writing for the administrative convenience of officials does nothing to alter this point. The commander's initial ejection of the demonstrators in *May* is no more vindicated by prosecuting the visitor several years later if the visitor had been photographed and ordered not to return in writing than if the commander had simply shouted his order through a bullhorn to the demonstrators en masse.

seriousness of this sort of deprivation is shown particularly by this case, for under the government's view anyone banned for life from Hickam is, among other things, eternally prohibited from using Honolulu International Airport, a portion of whose main runway is located within the confines of the base. When Congress acted to vindicate the authority of commanders to eject unwelcome visitors, it could not have imagined it was sanctioning such extensive and permanent deprivations of liberty merely as a consequence of removal from a military base.[24]

The United States does "not dispute that a bar letter may expire after some reasonable period of time" (Reply Mem. 3). But if reentry "after some reasonable period of time" following removal or an order not to return does not violate the statute, it is difficult to understand how respondent's reentry can be held to be within the limited, reasonable time of exclusion provided by the statute. Respondent's return to Hickam took place more than nine years after he was ordered by the then commander of Hickam not to return. Both the immediate situation that caused his ejection from the base and the broader political context that occasioned his disruptive act in 1972 and the resulting bar letter had long since receded into history, so that there can be little claim that a permanent bar is necessary to vindicate the prior commander's initial order to Mr. Albertini.[25]

24 This conclusion is particularly warranted in light of the startlingly casual manner in which bar letters are dispensed by some base commanders, as documented in a survey by a military scholar. *See* Lloyd, *Unlawful Entry and Re-entry Into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 Military L. Rev. 137, 159-63 (1971).

25 We note that the Federal Rules of Evidence recognize that the probative value of past acts diminishes over time, based on considerations of "fairness and relevancy." *See* Fed. R. Evid. 609(b) (Notes of Advisory Committee).

(footnote continued)

The past practice of the government in bringing prosecutions under this statute, and the apparent present administrative practice of the military authorities in issuing bar letters, fully support the view that the "reasonable period of time" after which the government concedes a bar letter expires does not extend to the nearly ten-year period at issue here. In no reported case resulting from a prosecution under a bar letter has the prosecuted reentry occurred more than a year after issuance of the order, and in many cases, the reentry took place within a matter of days.[26] The time periods in those cases were thus fully "reasonable," judged against the congressional purposes in enacting § 1382.

Current administrative practice also appears to support the view that criminal trespass prosecutions are inappropriate more than a year or two beyond the time of expulsion. At least so far as can be determined from this record, the prevailing

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The question of whether respondent's bar letter might have been renewed or extended between 1972 and 1981, based on some reasonable assessment of his conduct or of existing conditions in the interim, is not before the Court. This prosecution is not based on any such assessment. To affirm this conviction would require this Court to hold that respondent's mere ejection from Hickam in 1972 in itself is sufficient, without any further review or reassessment by the base commander or his successors, to make it a crime for him to set foot upon the base for any purpose on any subsequent occasion for the rest of his life.

26 *See, e.g., United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984) (reentry less than two months after bar letters); *United States v. May, supra*, 622 F.2d 1000 (181 defendants; reentry of 176 was within a day of bar order; reentry of 5 was 10 months after earlier bar letter); *United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978) (reentry 17 days after bar letter, one day after earlier reentry and ejection with warning of possible prosecution); *United States v. Flower*, 452 F.2d 80 (5th Cir. 1971), *rev'd*, 407 U.S. 197 (1972) (two months); *Government of Canal Zone v. Brooks*, 427 F.2d 348 (5th Cir. 1970) (date of reentry not specified in opinion; bar letter issued seventeen months prior to date of affirmance of conviction); *United States v. Jelinsky*, 411 F.2d 476 (5th Cir. 1969) (reentry less than eight months after order); *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967) (two days); *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960) (immediate reentry on same day as expulsion); *United States v. Ramirez Seijo*, 281 F. Supp. 708 (D.P.R. 1968) (five months).

practice today at Hickam appears to be to issue bar letters prohibiting reentry only for a one- or two-year period. J.A. 60-62. Indeed, the Hickam authorities themselves seem to have doubted the continuing validity of the 1972 order, for (as the Solicitor General asserts in an excursion beyond the record) they apparently attempted to serve a second bar letter on Mr. Albertini in 1981.[27]

Judged by the appropriate statutory standard—the duration necessary to effectuate the commanding officer's initial exclusion from the base—there can be no doubt that the 1972 bar letter had long since expired by the time Mr. Albertini attended the Hickam Field open house in 1981. Any more extended prohibition of reentry, based upon a stigmatizing conclusion that a particular individual is permanently unfit to exercise a liberty extended to the rest of the population, would require prior notice and an opportunity to be heard under the Fifth Amendment's due process clause.[28] At any rate, the power claimed here implicates governmental and individual interests that Congress did not address when it enacted § 1382 as an essentially limited, situational prohibition of reentry by those ejected from military bases.

B. Entry Onto a Military Base To Attend an Open House, Upon Invitation By The Base Commander To The Public At Large, Is Not Encompassed By The Prohibition of § 1382

Even if Congress had intended to prohibit a citizen from reentering a military base more than nine years after receiving a bar letter, respondent's conduct nevertheless did not violate § 1382 for a second reason. Congress certainly had no inten-

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27 *See supra* p. 6 n.14. In fact, we are advised (outside the record) that it has for some years been firm (but, for unknown reasons, unwritten) policy at Hickam to issue bar letters for no longer than three years.

28 *See Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (issuance of bar letter requires no procedure where no liberty interest impaired). We note that bar letters recently issued provide the notice and opportunity to be heard which respondent was denied. *Compare* J.A. 43 *with* J.A. 60-62.

tion of punishing a "reentry" in response to an open invitation issued by the base commander to the general public to attend an open house.

Respondent was tried and convicted, and if the judgment of the court of appeals is reversed will be punished by imprisonment, for the act of accepting an invitation to a base open house expressly issued by the base commander to the general public, without exception. We need not contend that the base commander was not entitled to make exceptions from his invitation, or even selectively to revoke the invitation and exclude respondent from the base. *Cf. People for Free Speech at SAC v. USAF*, 675 F.2d 1010 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 1092 (1982). It is, however, fundamentally unfair for a base commander to undertake a media campaign to encourage public attendance at a function, and then argue that one who responded to the invitation and whose behavior on the base is completely unobjectionable is guilty of trespass.

The legislative history demonstrates that Congress enacted § 1382 to put criminal sanctions behind the common-law power of the commander, as agent of the property's owner, to exclude unwanted visitors. Section 1382 is thus in the nature of a specialized criminal trespass statute, and an understanding of its intended scope can be gained by adverting to concepts of the law of trespass well understood by its draftsmen.[29]

As the American Law Institute has noted, the "common thread running through all [trespass-type] provisions is the element of unwanted *intrusion*." ALI, Model Penal Code § 221.2, Comment at 87 (1980) (emphasis added). Accordingly, the Model Penal Code does not make it a crime simply to trespass on what one knows is another's private property, even if the actor correctly believes that the owner would disapprove of his presence. Instead, the Code requires an additional element, some action by the owner to make clear to others that

29 *See* J.A. 43 (respondent's bar letter, stating that "you are being removed as a trespasser"); *see generally* Duncan, *Criminal Trespass on Military Installations: Recent Developments In the Law of Entry and Re-entry*, 28 JAG Journal 53, 56 (1975).

trespass will be regarded as an intrusion, such as by fencing, posting notices, or actual notice to particular unwanted individuals.[30] Model Penal Code § 221.2(2). The Model Penal Code is consistent in this respect with both traditional and modern statutes in virtually all American jurisdictions. *See* Comment to MPC § 221.2, *supra*, at 85-88.

In the context of § 1382, this element of intrusion is satisfied in most circumstances by receipt of a bar letter, which provides the "actual communication to the actor" contemplated by the Model Code as an alternative to fencing or posting. MPC § 221.2(2)(a). Thus, as the government correctly points out, § 1382 has effect even on a base which is generally open to the public.

But the government's attempt to equate an open base with an open house is facile and incorrect. Even a base to which access by the public is not specifically restricted remains a military preserve, designated for specific purposes. All members of the general public are well aware that their presence at such a base is tolerated only so long as it is consistent with the military mission of the base. The commander's power to exclude particular persons from this tolerance is not radically different in kind from the commander's power to close the base to all members of the public when necessary, and in either case notice to those excepted suffices to make clear that for the persons, places or time periods specified, the ordinary tolerance of entry is revoked.

Where, however, the military actually solicits attendance of the general public at the base, the situation is totally different. The notion of "intrusion" crucial to the idea of trespass dissipates entirely when the ordinary tolerance for visitors whose presence is consistent with military need gives way to a general transformation of the base into a virtual fairground at which the usual military functions are suspended and all sorts

30 This requirement is one of the objective elements of the offense, separate and apart from the Code's distinct *mens rea* requirement that a trespasser "know[ ] that he is not licensed or privileged" to enter. Model Penal Code § 221.2(2).

of activities normally treated as inappropriate in the military context are conducted and indeed promoted by the military authorities themselves for the benefit of the public generally.[31]

The Model Penal Code once again reflects this intuitive distinction by "exclud[ing] criminal prosecution for mere presence of a person in a place where the public generally is invited," even in circumstances where the other elements of a trespass violation (including actual notice of exclusion) are met. Comment to MPC § 221.2, *supra*, at 90. *See* MPC § 221.2(3)(b). As the Comment goes on to note, this defense is not intended to eliminate the owner's privilege to bar entry to, or to eject, any particular person, even from such a public proceeding. *Cf. People for Free Speech at SAC v. USAF*, *supra*. Rather, the defense simply reflects the intuitive notion that mere entry, even by an unwelcome individual, into property that has been expressly thrown open without discrimination to anyone who wishes to enter is not the sort of intrusion that the law recognizes as a criminal injury.

Congress can hardly have intended, in enacting § 1382, to criminalize attendance at a military open house by anyone who had ever, under whatever circumstances and for whatever reason and however long ago, been asked to leave that base. Even if it were conceded that some valid military purpose is served by issuing bar letters to servicemen given less than honorable discharges while serving on a particular base, for

31 In this connection, we are compelled to object to the government's sudden reliance in this Court on a 15th Airbase Wing regulation which has never before been mentioned (much less relied on) in this case, purportedly instructing that persons with bar letters would not be permitted entry to open houses, and which was "to be 'conspicuously posted at base or station entry points.' " U.S. Br. 8 n.3. Apart from the difficulty that it was not presented to the courts below, there is no indication that this regulation was posted for visitors (as opposed to the security personnel to whom it is addressed), and in any event we are advised—although clearly extra-record—that it was *not* so posted.

Air Force-wide regulations on security at open houses conspicuously omit any provision concerning exclusion of bar letter holders. *See* AFM 190-9, *infra*, at A-7.

example,[32] Congress can hardly have intended to make it a crime for them ever again to attend a public ceremony at the base.[33]

As under the Model Penal Code's trespass provision, this does not leave the base commander without the means to exclude those few individuals whose very presence he regards as inconsistent with the conduct even of an open house carnival such as that conducted at Hickam. We need not contend, for example, that the commander could not lawfully except Mr. Albertini from the public invitation, either in advance or by refusing him entry or by ejecting him from the open house; nor need we claim that, had the commander done so, reentry in defiance of such a specific preclusion even from the open house would not violate the statute. Our statutory claim is limited to the narrow one recognized by the Model Penal Code, that simple attendance at a public function to which the general public has been expressly invited cannot constitute the sort of intrusive entry that trespass statutes like § 1382 are intended to criminalize.

C. Because Mr. Albertini Attended The Open House In The Reasonable Belief That He Had Not Been Ordered Not to Attend, His Entry Onto the Base Was Not Prohibited By § 1382

Finally, even apart from the defects considered above, respondent's attendance at the Hickam Field open house was not the sort of "reentry" Congress intended to prohibit for the simple reason that § 1382 penalizes only one who reenters a base *knowing* that his reentry is in violation of an extant order not to return. In this case, the record is clear that Mr. Albertini reasonable believed that he was permitted to attend the open house, and his conviction therefore was erroneous.

32 Issuance of such bar letters has apparently been standard practice at some bases. *See* Lloyd, *Unlawful Entry*, *supra*, 53 Military L. Rev. at 150.

33 No prior reported case of a prosecution under § 1382 has involved attendance at such a public function.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court emphatically reaffirmed the "familiar proposition" that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 436 (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). Accordingly, "[t]his Court, in keeping with the common-law traditions and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' *Rewis v. United States*, 401 U.S. 808, 812 (1971), has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. United States Gypsum Co.*, 438 U.S. at 437. A reading that would dispense with such an interpretation is "disfavored," and "[c]ertainly far more than simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *Id.* at 438.

There can be no question that § 1382 comes squarely within this rule of interpretation. Trespass, the legal concept that lies at the heart of § 1382, was not, strictly speaking, a common-law crime, as was the core concept of the statute discussed in *Morissette v. United States*, 342 U.S. 246 (1952).[34] But criminal trespass statutes were common long before the adoption of § 1382, and both traditional and contemporary criminal trespass statutes share "the common requirement . . . that the actor be aware of the fact that he is making an unwarranted intrusion." ALI, Model Penal Code § 221.2, *supra*, Comment at 88. The Model Penal Code accordingly carried forward this "knowledge requirement . . . designed primarily to exclude from criminal liability both the inadvertent trespasser and the trespasser who believes that he has received an express or implied permission to enter." *Id.*[35]

34 *See, e.g., Holdridge v. United States, supra*, 282 F.2d at 310; *United States v. Bishop*, 261 F. Supp. 969, 971 (N.D. Cal. 1966).

35 The requirement is embodied in MPC § 221.2(2): "A person commits an offense if, *knowing that he is not licensed or privileged to do so*, . . ." (emphasis added).

Those federal courts that have considered the issue have unanimously concluded that § 1382 requires the government to demonstrate not only that a defendant reentered a base after having been ordered not to return, but also that he did so knowing that his reentry remained prohibited. While courts have rarely had the opportunity to consider the issue directly, since § 1382 prosecutions have typically involved circumstances in which the inference that the defendant knew he was barred is irresistible, courts have nevertheless been careful to point out that reentry *known by the defendant to be barred* is required by the statute, and was demonstrated in cases before them. *See, e.g., United States v. May*, 622 F.2d at 1006 ("appellants . . . had adequate knowledge that their reentry of the base was prohibited"); *United States v. Parilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981) (statute not addressed to "innocent trespassers"; recent receipt of bar letter establishes knowledge); *Holdridge v. United States*, 282 F.2d 302, 308-09 (8th Cir. 1960) (Blackmun, J.) (accused was "definitely aware that re-entry is prohibited"); *United States v. Ramirez-Seijo*, 281 F. Supp. 708, 711 (D.P.R. 1968) (conviction reversed where government failed to prove that defendant had ever received bar letter and therefore that defendant reentered the base "knowingly and fully aware" of the bar order).[36] Once again, no reported case sustains a conviction for violation of § 1382

36 *Holdridge* has sometimes been misread as holding that no *mens rea* element is required by § 1382. *Cf.* Lloyd, *Unlawful Entry, supra*, 53 Military L. Rev. at 138. While the language of that opinion is not always clear, its holding is unmistakable that § 1382 *does* require reentry with knowledge that reentry violates an extant prohibition, and that the mental element *not* required by § 1382 is a *further* intent to reenter for a corrupt or evil motive. The defendants in *Holdridge* reentered the base immediately after being ordered to leave; as the court was at pains to point out, they were "definitely aware" that they were not allowed to reenter. What *Holdridge* rejected was the defendants' claim that they were entitled to acquittal because they did not enter for an evil motive. We do not dispute this correct statement of the basic principle of criminal liability that one who violates a criminal statute for an arguably noble purpose is not thereby excused. (The distinction is correctly noted, and *Holdridge* correctly read, in Duncan, *Criminal Trespass on Military Installations: Recent Developments in the Law of Entry and Reentry*, 28 Navy JAG Journal at 62-64).

where the defendant was not aware that a bar letter, then in force, prohibited entry onto a base.[37]

On the record in this case, it is clear that respondent did not reenter Hickam Field on the occasion of the open house with the knowledge required to violate the statute, and that his belief was reasonable. *See supra* pp. 6-8. Even if this Court were to reject the contentions set out above, that the bar letter *in fact* did not prohibit his entry on that day because after nine years it had become stale, because the military had invited the general public to attend the open house, and because the military had apparently treated the bar letter as defunct, the government has never disputed and not a shred of evidence contradicts Mr. Albertini's testimony that he reasonably *believed* that the order did not prohibit his attendance at the open house, for these among other reasons. Instead, the government chose to argue, and the district court based its verdict on, the proposition that such knowledge was irrelevant, and that Mr. Albertini's state of mind had to be disregarded. T. 88, 95. Under these circumstances, a conviction for violation of § 1382 cannot stand.[38]

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37 Nor can Mr. Albertini's belief that he was not barred from attending the open house be dismissed as a "mistake of law." First, his belief that the bar letter no longer was in effect and did not apply to the open house was as much a matter of fact about the attitude of the base commander as it was a legal conclusion about the legal force of bar orders. Second, whether a mistake is one of fact or of law is essentially irrelevant if it "negatives the purpose, knowledge, [or] belief . . . required to establish a material element of the offense." Model Penal Code § 2.04(1)(a). Since the relevant physical element of this offense is not merely the fact that the actor had once been ordered not to return, but the existence of a continuing prohibition on entry, *see supra* p. 22, the corresponding mental element must be interpreted in the same fashion. Mr. Albertini's belief that he was *not* under such a prohibition is thus completely inconsistent with the state of knowledge required for conviction.

38 If the statute were construed not to require the knowledge element, it would violate the due process clause, *Lambert v. California*, 355 U.S. 225 (1957), especially as applied here, *Smith v. California*, 361 U.S. 147 (1959). Conviction in the face of the public invitation, and the military's consistent treatment of respondent's bar letter as defunct (*see* pp. 7-8, *supra*), would also violate the holdings of *Cox v. Louisiana (II)*, 379 U.S. 559, 571 (1965) (due process violated where state convicts "a citizen for exercising a privilege which the state clearly told him was available to him") and *United States v. Pennsylvania Industrial Chemical Corporation*, 441 U.S. 655, 670-75 (1973) (same).

No previously reported § 1382 case has sustained a conviction in which a defendant's previous ejection from a base had taken place more than a year before the prosecuted reentry—still less nearly ten years later; in which the prosecuted entry consisted of mere presence at an open house in response to a public invitation; or in which the defendant was completely unaware that his presence was inconsistent with orders of the base commander. Particularly in view of the desirability of avoiding the constitutional questions raised by this prosecution, *see, e.g., Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), and the rule of lenity, this Court should consider and dispose of the case on any one, or all, of these statutory grounds, which would be sufficient to sustain the judgment below.

II. THE FIRST AMENDMENT PROHIBITS RESPONDENT'S CONVICTION

Respondent's conviction violates the First Amendment in two independent respects. First, assuming, as the government does and as this Court's cases clearly require, that the invitation to and events put on for the public gave rise to a right of the public to attend and participate in the Hickam open house, respondent's expulsion and consequent conviction under § 1382 pursuant to the base commander's standardless discretion cannot be justified under controlling standards. Second, whether or not the Hickam open house was a public forum, respondent's conviction was impermissibly content-based.

A. Respondent Cannot, Consistent With the First Amendment, Be Convicted for Peaceful Entry Into and Presence at the Open House

The government's bold assertion (Br. 26) that "the First Amendment has essentially no bearing on this case at all" is a

fundamental error. The government suggests that the power to exclude recognized in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), and implemented through § 1382, is, as a content-neutral grant of authority, fully enforceable regardless of whether the base at which it is invoked has been transformed by the military into a significant forum for the exchange of ideas, education, and public relations.

But whether § 1382 or analogous trespass statutes which protect governmental property generally may be enforced against persons undertaking peaceful expressive activity has always depended on the extent to which the property is opened to the public generally, and particularly opened for speech and the exchange of ideas. Otherwise, the Court's judgment in *Adderley v. Florida*, 385 U.S. 39 (1966), would not have depended, as it so obviously did, on whether petitioners there were demonstrating on "the curtilage of the jailhouse" dedicated for jail uses; and the state could have punished, consistently with the First Amendment, the protest activity repeatedly held protected in such cases as *Edwards v. South Carolina*, 372 U.S. 229 (1963), *Cox v. Louisiana*, 379 U.S. 536 (1965), and *Brown v. Louisiana*, 383 U.S. 131 (1966), under simple state trespass statutes.[39]

As *Adderly* makes plain, therefore, the central inquiry must be whether the circumstances at the open house were sufficient to clothe those attending it with a First Amendment right precluding their discretionary exclusion based soley on conduct more than nine years in the past. This Court's decisions indicate unmistakably that the government's express one-day invitation to the general public to participate in educational and public relations activities designed to promote public support for military programs precludes the exclusion of individuals undertaken, as here, pursuant to a standardless delega-

39 To be sure, the convictions overturned in those cases were based on vague breach of the peace statutes. But the Court made it clear that petitioners' conduct in those cases, including their presence on state-owned property, was constitutionally immune from proscription, save for reasonable time, place, and manner regulations. *See, e.g., Edwards v. South Carolina*, 372 U.S. at 236; *Heffron v. ISKCON*, 452 U.S. 640, 647 (1981).

tion of power to base commanders, and based solely on actions nine years in the past. The exclusion of selected individuals from an event like the open house, and consequent infringement of their right to hear the government's speech and to engage and participate in expressive activity, can be justified, if at all, not simply on past conduct, but rather only on harm to the government's interests, or a realistically imminent threat of it, at the open house itself.

1. The authority of states, localities, and the federal government to exclude persons from government property through the enforcement of facially valid and content-neutral regulations such as criminal trespass ordinances is always subject to the limitations imposed by the First Amendment. *United States v. Grace*, 461 U.S. 171 (1983); *Flower v. United States*, 407 U.S. at 198-99; *Adderly v. Florida*, 385 U.S. at 417 (by implication). Whether First Amendment protection arises through tradition or intentional government dedication, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), or as the necessary consequence of voluntary government opening up of property for expressive activity, *id.*, "the Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263 (1981), *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976)).

Reduced to its essentials, the government's argument is that any criminal trespass statute (which is what § 1382 amounts to) is enforceable on any government property, regardless of the extent to which the property is opened for expressive uses, since such statutes are content-neutral and not targeted at speech. Under the government's view, trespass statutes are like tripwires, which stop an individual from reaching a place even if he might have a First Amendment right once there. The government suggests that the First Amendment is entirely irrelevant (Br. 26-29), or that it comes into play, if at all, only through application of the incidental speech restriction analysis

of *United States v. O'Brien*, 391 U.S. 367 (1968) (Br. 29-34). But the analysis of *Adderly*, and its place both in the long line of civil rights demonstration cases and this Court's public forum jurisprudence, make plain that the First Amendment objections to enforcement of trespass statutes to exclude individuals from government property opened for expressive activity are considerably more substantial. Had the authorities used criminal trespass statutes rather than vague ordinances against breach of the peace, the demonstrators on the state capital grounds in *Edwards v. South Carolina*, *supra*, or in the public library in *Brown v. Louisiana*, *supra*, could still not have been convicted. The respondents in *Heffron v. ISKCON* could be confined for certain purposes to a booth but, as the Court made clear, not excluded altogether from the Minnesota State Fair.[40] Had the respondents in *United States v. Grace*, *supra*, been prosecuted under the District of Columbia's criminal trespass ordinance through the Assimilative Crimes Act, 18 U.S.C. § 13, or for "stand[ing] on the Supreme Court sidewalk" under 40 U.S.C. § 13k, rather than for displaying a banner under that section, it is inconceivable that any different result could have been obtained.

2. As the Ninth Circuit recognized, petitioner's extended defense of § 1382 as a "neutral prohibition" is particularly inconsistent with *Flower v. United States*, *supra*. In *Flower*, this Court assumed that § 1382 was constitutional on its face, but nevertheless proceeded to examine the facts of the particular entrance, concluding that the conviction could not be sustained because a portion of the underlying conduct was protected. *Flower*'s approach, of course, was consistent with this Court's settled practice in First Amendment cases of examining not only whether a statute is constitutional on its face (i.e., a neutral prohibition), but also—even if it is—whether it is applied to constitutionally protected activity. As *Flower* holds, even facially valid statutes cannot be used to

40 452 U.S. at 655.

suppress conduct which individuals have a First Amendment right to engage in at a particular time and place.[41]

The government understands *Flower* to stand solely for the proposition that "a person cannot be prosecuted under § 1382 on the basis of a bar letter that was issued because he engaged in constitutionally protected activity." U.S. Br. 35; *see also id.* at 27. But *Flower*, and the Court's gloss on it in *Greer*, can be searched in vain for so limited a holding, or indeed for any holding based solely on the invalidity of the bar letter. The dissenting judge in the Court of Appeals relied squarely on the protected nature of Flower's conduct when he was arrested, 452 F.2d 80, 93 (5th Cir. 1972). This Court's opinion vindicating the dissent is premised as much on the protected nature of Flower's activity during the reentry as on the invalidity of the bar letter. *See* 407 U.S. at 198-99.[42] It is precisely this required focus not only on the protected nature of the initial entrance, but on the reentry as well, that protects respondent (and other bar letter holders at Hickam) from conviction for entering Hickam when they travel into and out of Honolulu's International Airport, unavoidably using a runway located within the base, regardless of the validity of the initial bar letters.[43]

41 *See, e.g. Adderly v. Florida*, 385 U.S. at 46-47; *Cox v. Louisiana I*, 379 U.S. at 544-51; *see also Bose Corporation v. Consumers Union*, 80 L.Ed.2d 502 (1984); *Jenkins v. Georgia*, 418 U.S. 153 (1974). Thus, in *Greer v. Spock*, the court carefully analogized Fort Dix to the Tallahassee jail in *Adderly*—governmental property dedicated to a purpose which the state had a right to engage in without interference, and distinguished it from governmental property which has been generally opened to the public (whether by tradition or affirmative action) and whose official uses "at a particular time" are not incompatible with the proposed "manner of expression." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

42 Previous cases make plain that First Amendment rights can generally not be abridged by relying solely on past conduct to establish a present threat to government interests. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Entertainment Concepts v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

43 *See supra* p. 8. Surely the government does not assert that respondent's use of Honolulu's airport constitutes a violation of § 1382. Once it so concedes, however, it contradicts its surprising assertion that Flower could

Notwithstanding the government's reading, then, *Flower* is based not on a special rule for this military situation, but rather on the longstanding rule that a conviction may not stand where it rests, in part, on conduct fully protected by the First Amendment. Conviction under § 1382 rests on two unpermitted entrances (where the defendant is placed on specific notice after the first that the second would incur a penalty). The court of appeals properly concluded on the basis of *Flower* and the "long-established constitutional rule" it applied, *Greer v. Spock*, 424 U.S. at 835, that where either entrance is protected, the First Amendment bars conviction.

3. So far as the First Amendment is concerned, and leaving aside the question of the base commander's motive, *see* Point II B *infra*, we do not dispute that respondent could have been prosecuted under his bar letter on any day when there was no open house, regardless of his own motive to engage in expressive conduct.[44] Accordingly, the judgment below depends, as the Ninth Circuit correctly discerned, on whether the invitation to the public to enter the base freely during the open house to engage in expressive and entertainment activities and to hear the Air Force's message clothed the public with First Amendment rights at the open house.

In this Court, the government has assumed *arguendo* the correctness of the court of appeals' conclusion (Pet. App. 8a-13a) that Hickam was sufficiently "opened to the public for purposes inextricably associated with and appropriate for expression" that the government's power to exclude was substantially constricted (U.S. Br. 24-25). Under those circumstances, we believe the Court should do the same, and decide the case on the assumption that individuals without bar letters have a First Amendment right to attend the open house and to engage in expressive activity directed at civilians there.

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have been convicted for his leafletting activity on New Braunfels Avenue had his bar letter been received for non-First Amendment activity (Br. 36).

44 *See supra* p. 25 n.36. Of course, respondent here has additional statutory and due process objections to enforcement of § 1382 against him. *See supra* Point I.

In any event, the Ninth Circuit's conclusion that the open house at Hickam was constitutionally distinguishable from Fort Dix in *Greer v. Spock* is not only not "open to serious question" (U.S. Br. 23 & n.11), it is clearly correct.

First, the open house was plainly "designed for and dedicated to expressive activities." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 555.[45] In sharp contrast to the character of the base on other days, when members of the public are permitted on the normally closed base only insofar as their presence is "supportive of the military mission" of Hickam, *see Greer v. Spock*, 424 U.S. at 838 n.10, "the scene [at the Hickam open house] was perhaps closest in character to the state fair grounds in *Heffron*, and partook of its nature as a public forum. *The Air Force did much more than merely permit visitors on the base. Armed Forces Day was created especially for public participation.*" Pet. App. 9a (emphasis added).[46] The base was not exclusively dedicated for internal government business, as in *Greer* and *Perry*, but opened non-selectively (for a limited period of time) with the express understanding that civilians could freely enter, *not* to assist the

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45 *Accord*, *Widmar v. Vincent*, *supra* (through policy of accommodating student group meetings held in university facilities, university created forum generally open to use by student groups); *Heffron v. ISKCON*, *supra* (Minnesota State Fair was limited public forum in that it was designed to provide means for great number of exhibitors to present their views to large audience); *City of Madison Joint School Dist. v. Wisconsin Public Employment Comm'n*, *supra* (school board business meetings opened by state for direct citizen involvement constituted public forum). *Cf. Hague v. CIO*, 307 U.S. 496 (1939) (resting availability of a given locale for expressive activity upon its historical role as an arena for public expression).

46 The government's complaint that the district court made no "findings of fact on the precise nature of the open house" (Br. 24 n.11), and reliance on a regulation apparently prohibiting the kind of open house that Hickam in fact held, provide no basis for rejecting the Court of Appeals' characterization, which is squarely based on the military's own announcements and plans, record testimony, and photographs admitted into evidence. *See generally* Statement, *supra*, at 2-4.

training and mission of the soldiers, but for the entertainment and education of civilians.[47]

Second, respondent's activity—peaceful presence and the taking of photographs on the open portions of the base, and association with his companions—was not "incompatible with the normal activity of [that] particular place at [that] particular time," *Grayned v. City of Rockford*, 408 U.S. at 116; *see generally Greer v. Spock*, 424 U.S. at 842-47 (Powell, J., concurring). To the contrary, the Air Force expelled Mr. Albertini from the base for engaging in the very activity for which the Air Force had invited the entire population of Hawaii. In *Greer*, the Court readily concluded that the presentation of political speech to military trainees by civilian candidates was incompatible with the governmental business for which Fort Dix was exclusively operated. During the Hickam open house, on the other hand, the public was invited through the media, and expressive and entertainment events were planned for the public's special benefit. The base was being used not solely for the dispatch of Air Force business, but rather, as the government has expressly conceded, "to convey a message to the civilian guests, to present the military's view in the current arms debate, to show the public that its money is being used efficiently."[48]

47 In *Perry*, relying on *Greer*, the Court held that one indication that government has designated a forum for expressive activity is a policy of allowing entrance to *and use of* the forum without express permission. 460 U.S. at 47 ("If by policy or practice, the Perry School District had opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created"); *see also Widmar v. Vincent*, 454 U.S. at 267-68; *Carey v. Brown*, 447 U.S. 455 (1980). Here there were *no* express limitations on those who could attend, or on the (lawful) activities which the public could engage in at the open house. Moreover, the public was not merely passively allowed on the base, as in *Greer*; it was actively invited through invitations widely carried in mass media, and special events were planned for the public's benefit.

48 Pet. App. 10a; *see also id.* at 9a; U.S. Br. 40 (purpose of open house was "communication . . . between the military and civilian communities"). The military's keen awareness of the importance of communicating its own message widely is evidenced in AFM 190-9, figure 4-4 (22 Sept. 1972), reproduced in an addendum, *infra*, at A-1 *et seq.*

Moreover, where, as here, the government is not simply a passive stakeholder in a public forum, but is participating in expressive activities to propagandize its own point of view, and indeed is using public invitees as a backdrop for wide dissemination of that message through media invited to cover the open house (*see* addendum *infra*), the constitutional imperative of permitting speech activities not incompatible with the forum is especially great. *Schact v. United States*, 398 U.S. 58 (1970).

Thus, the vital concern for the non-politicization of the military which underlay *Greer* is wholly absent here. *See* Pet. App. 10a. First, the government does not, and could not, defend the enforceability of § 1382 at base open houses with reference to the interest in military neutrality and civilian control; § 1382, unlike the regulation at issue in *Greer*, is not premised on any such concern.[49] In any event, reliance on the concerns animating *Greer* is unavailing here, where the Air Force was already expressing its own inescapably political message to the public, and where "Albertini's expression, like that of the Air Force, was directed primarily toward the non-military public." Pet. App. 9a. *See supra* n.48. Moreover, even assuming *arguendo* that the open house could have been sufficiently limited to prohibit booths of political groups, individuals peacefully expressing their own views (like respondent) could not have been excluded altogether. *People for Free Speech at SAC v. United States Air Force*, 675 F.2d at 1020 nn.3, 9.

In short, based on the factors which distinguish government property utilized for the dispatch of the government's own business from that which has been more broadly opened for public expressive activity, the open house at Hickam was located at the "limited public forum" end of the spectrum.

49 The Court in *Greer* relied heavily on the interest in "keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind," 424 U.S. at 839, and Justice Powell, concurring, elaborated on the importance of "public confidence that civilian control remains unimpaired, and that undue military influence on the political process is not even a remote risk." 424 U.S. at 845-47.

4. Having opened the base to the public for what the court of appeals found (Pet. App. 9a), and the government concedes (Pet. 12; Br. 26 n.11, 38-40), were expressive activities including the delivery of a governmental message to the public, the Air Force's power to exclude individuals was substantially restricted. *Perry*, 460 U.S. at 45. Where individuals merely seek entry to places where the general public has a right to hear and to participate in expressive activities, there is not the slightest support in this Court's cases for any power to exclude through the exercise of an unbridled discretionary power of selective admission, as here, or even on the basis of specified misdemeanor convictions, much less actions occurring nine years in the past. To the contrary, we submit that a discretionary power of exclusion is unreasonable *per se*, and that the authority to deny certain individuals access to a place where the public has a First Amendment right to listen and engage in its own expression is constitutional only if it is narrowly tailored to achieve compelling governmental purposes. *Carey v. Brown*, 447 U.S. 455 (1980) (striking down prohibition on civil rights picketers where labor picketing permitted); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (same).[50]

Even if a power of selective exclusion circumscribed by narrow and definite rules could be squared with the First Amendment, the standardless power to exclude exercised here runs afoul of the rule of such cases as *Kolendar v. Lawson*, 461 U.S. 352, ____, 75 L.Ed.2d at 910-11 (1983); *Cox v. Lousiana I*, 379 U.S. at 557-58; and *Lovell v. Griffin*, 303 U.S. 444, 450-53 (1938). And the discretionary grant being invalid, its

50 The only two other cases even adverting to a discretionary power of exclusion strongly indicate its invalidity *per se*. *See Heffron v. ISKCON*, 452 U.S. at 655 (noting "[m]ore importantly" that although religious group could be limited to fixed booth, it had not been "exclude[d] from the fairgrounds" or denied "the *right* to conduct . . . activity . . . *within the forum*") (emphasis added); *Madison School District v. Wisconsin Employment Commission*, 429 U.S. at 173, 179 (barring an order prohibiting school board "from permitting employees to *appear* and speak at meetings of the Board of Education"). The exclusion of specified individuals based on past conduct, at issue here, raises quite different problems from the limited purpose forums recognized in the Court's cases. *See Perry*, 460 U.S. at 45 n.7.

exercise in a particular case, even on the basis of conduct which could have supported exclusion on the basis of a properly drawn rule, would also be invalid. *Cox v. Louisiana I*, 379 U.S. at 558; *cf. Hynes v. Borough of Oradell*, 425 U.S. 610, 617 (1976). Nor would a rule more narrowly authorizing exclusion on the basis of any previous conviction permit exclusion from public forums in any event: it is fundamental to this Court's jurisprudence that First Amendment rights cannot be suppressed on the basis of such retrospective findings. *Near v. Minnesota*, *supra*; *see also supra* n.42.

If, therefore, as seems certain, the authorities in such cases as *Widmar v. Vincent*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, *Southeastern Promotions, Ltd. v. Conrad*, and *Heffron v. ISKCON* could not have excluded specific individuals such as respondent through the standardless invocation of a nine-year old misdemeanor, the government's power to exclude respondent to further the interest in base security must rest on some special rule pertaining to military property. Neither of the two bases we can perceive for such a special rule could support it.

First, a special power to exclude the public on a discretionary basis from military property opened to the public for expressive purposes might rest on a basic difference between government property used by the military and that used for other purposes. But such a distinction is quite inconsistent with *Greer*, where this Court strongly condemned the notion of a special access rule for military bases, and simply examined the facts to place the case on the standard *Hague-Adderly* spectrum.[51] Moreover, from a functional point of view, fully granting the need to protect military property (in common with all government property) from vandalism and destructive conduct generally, it is implausible that *all* military property opened to the entire population of a surrounding state for expressive activities is inherently more in need of special

51 *See* 424 U.S. at 836.

protection than other government property.[52] The central organs of government in Washington lie immediately adjacent to traditional public forums, as do courthouses, police stations, legislatures, and armories throughout the nation. Common sense dictates that the military is at least as well equipped to protect military property during a one-day open house as law enforcement authorities are to deal with the potential security of the President and Congress and local installations, especially when the military (unlike the administrators of streets and parks) has the undoubted power to exclude the public in the first place.

Second, the government seems to argue that a special power to exclude derives from the traditional authority of commanding officers to exclude civilians from the area of their commands, recognized by § 1382 (Br. 22-23). But this authority is not conceptually or functionally different from the power public officials generally exercise under criminal trespass statutes or analogous statutes authorizing exclusion of the public from federal government property dedicated for governmental use.[53] Nor could § 1382 itself be thought to provide such special authority; it does not confer any substantive authority whatsoever, but merely provides for the implementation of the inherent exclusionary authority that military commanders, like government officials generally, have over public land dedicated to government activity.[54]

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52 It is relevant in this regard that approximately twenty-five percent of the land in Oahu is under military control. We are also advised that the military has barred certain individuals from the entire sector of West Berlin that is under American (i.e., American military) jurisdiction. (A copy of a bar letter so stating is being provided to the Solicitor General.) *Cf. United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973) (striking down application of § 1382 to area surrounding football stadium at Air Force Academy).

53 *See, e.g.*, 40 U.S.C. § 13g, § 193f(b), and § 318.

54 *See, e.g.*, JAGA 1956/8970 (27 Dec. 1956) ("the provisions of title 18, United States Code, section 1382, . . . do not themselves, grant authority for the ejection action taken although they do provide an effective sanction when such orders are disregarded"); *see generally Cafeteria Workers v. McElroy*, 367 U.S. 886, 892-93 (1961).

5. As we have demonstrated, there is not a scintilla of support for upholding under the First Amendment discretionary power to exclude individuals from government property that has been opened to the public for expressive purposes, and no principled basis on which to predicate any such power uniquely for military commanders.

The government did not make any effort to undertake the kind of particularized assessment of the respondent's likely harm that could satisfy the compelling interest test, and, given the manner in which bar letters are casually issued and sporadically enforced (*see infra* at 40-42), the exclusion of all bar letter holders surely could not meet that test. Nor could the exclusion here be defended as a reasonable time, place, and manner regulation where it entirely denies an individual "access *within the forum in question*." *Heffron v. ISKCON*, 452 U.S. at 655 (emphasis added).

The government suggests that such authority can be upheld through the approach of *United States v. O'Brien, supra*. If accepted, this approach would sanction discretionary exclusions not only from military bases which were opened to the public for expressive activities, but from all public forums generally, without the need to show that exclusion in a particular case was narrowly tailored to meet a compelling governmental interest.[55] Moreover, even assuming *arguendo* that *O'Brien* is the correct analytical tool for assessing the question,[56] *O'Brien* makes plain the invalidity of this remarkable claim of authority so entirely inconsistent with prior decisions.

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55 Under the government's analysis, for example, there is apparently no First Amendment impediment to the Secret Service's exclusion of anyone previously convicted for a misdemeanor on the Mall in Washington, D.C., from appearing on the Mall again, even to attend a subsequent demonstration there; and no impediment to punishment for such subsequent attendance if Congress passed a law so providing.

56 Although it has recognized that the two doctrines tend to merge, *Clark v. Community for Creative Nonviolence*, 468 U.S. ____, 82 L.Ed.2d 221 (1984), the Court has repeatedly examined restrictions on the places where individuals can engage in First Amendment activities under the reasonable time, place and manner doctrine. *See, e.g., Heffron v. ISKCON*, 452 U.S. at 647 & n.10; *Grayned v. City of Rockford, supra*.

At the least, the incidental restriction on First Amendment freedoms—the exclusion of all individuals who have received bar letters from military open houses (pursuant to base commanders' standardless discretion to issue such orders)—is "greater than is *essential* to the furtherance of [the government's] interests" (391 U.S. at 377), and therefore invalid under *O'Brien's* fourth criterion. The government contends that the court of appeals misunderstood the practicalities of administering an open house, and that it is *more* difficult to maintain security during base open houses (Br. 33-34). That objection, however, is cut from whole cloth, and has no basis in the record. It is at least as likely that the express and meticulous attention to security undertaken during the few hours a year when Hickam is open to the public (*see, e.g.*, J.A. 52-53; AFM 190-9, *infra*, at A-1 *et seq.*) makes for far greater security than when base personnel are not prepared for unusual events. Not a single reported § 1382 decision involves vandalism or a breach of security during an open house, whereas numerous cases involve such breaches when bases are closed.

More importantly, although a base commander's extremely broad and standardless discretion to exclude under § 1382 may be appropriate under normal base conditions, *cf. Cafeteria Workers, Greer v. Spock*, that very breadth precludes the enforcement of *all* such exclusions from being "*essential*" to the government's interest under *O'Brien*.

The government's own practices make plain that it does not consider the blanket application of bar letters at base open houses to be necessary to serve its interests. Thus, it is long-standing military policy not to enforce bar letters to the extent that the bar letter holders have statutory rights to base privileges.[57] Moreover, and we believe dispositively, at least some

57 JAGA 1969/4646 (24 Nov. 1969) ("With respect to barring retirees from an installation, consideration should be given to the fact that such action might have the effect of denial of access to facilities, entitlement to which has its basis in statute (commissary and medical care). Accordingly, unless the activity giving rise to barring a retiree from an installation bears a reasonable relationship to the use of such facilities (e.g., shoplifting, writing bad checks, drug addiction, or serious anti-social actions, the opportunity for which would be encouraged by his presence in the facility), the bar order should authorize access thereto"). *See also* DAJA - AL 1978/4198 (21 December 1978) (reaffirming policy of not enforcing bar order to extent of conflicting "private interests . . . and particularly statutory benefits . . . regardless of the availability of benefits at another location. . . .").

other bases do not enforce bar letters at open houses *at all*. Thus, in *People for Free Speech v. U.S. Air Force, supra*, Chief of Security Lieutenant Colonel Russell J. Suchy was asked whether he "instruct[ed] the Security staff at the base not to admit people that had ban-and-bar letters." He responded:

> Just the contrary. Since it was a public forum and an Open House they were told that personnel on a ban-and-bar list, if they conducted themselves in a proper manner and committed no offenses, they would be allowed to enter into the installation. That was my instruction to them.[58]

When the military declines as a matter general national policy to enforce bar letters at closed bases where they conflict with "private interests" and impede access to statutory benefits such as PX privileges, and when it declines to enforce bar letters at all during base open houses at Offutt Air Force Base, headquarters of the Strategic Air Command, enforcement of all bar letters can hardly be necessary at Hickam.

A number of other factors buttress the conclusion that the uniform enforcement of law letters at open houses is not "essential" to the furtherance of the government's interest. Bar letters are limited by tradition (and their enforcement by statute) to the particular base at which they are issued. If a recipient of a bar letter at one base were genuinely deemed *ipso facto* to be a serious security risk, surely he would not be permitted freely to enter open bases (like Fort Dix) throughout the nation. Moreover, the current practice of issuing time-limited bar letters makes plain that the military itself believes that its security needs can be served without enforcing nine year old bar letters. *See supra* p. 19 & n.27. Although sufficiently

58 Transcript in CV 81-0-329 (D. Neb. August 3, 1981), at 11.

strong interests may warrant enforcement of bar letters during ordinary times when no First Amendment interests are implicated, their enforcement when the public is expressly invited onto a base for expressive activities as at Hickam is far broader than necessary to protect the government's interest. This is particularly true since the base is already protected both by heavy security and by a complete range of statutes covering misconduct occurring at the open house.

Finally, it is particularly relevant that bar letters are issued under non-existent standards and for myriad reasons, unlimited by regulation, often perpetual in duration, and apparently extending in practice at some bases to routine barring of all those who receive less than honorable discharges. As the facts of this case show (*supra* p. 7 & n.17), enforcement is just as casual and sporadic. Under these circumstances, the government's contention that the implementation of all bar letters whenever military property has been opened as a forum is "essential" to furthering the government's interests is hopelessly overblown.[59]

One could imagine a rationalized system of bar letters in which the Congress or the military would provide clear standards governing the issuance and expiration of bar letters, and specifying, based on risk of harm, which bar letters must be enforced even when bases are opened for expressive activity. Arguably, application of particular bar letters during open houses could reasonably be deemed necessary. But even if the application of § 1382 to that narrow category of bar letters

59 As a leading commentator on bar letter practice has observed, "some installations have no record of any bar letters ever having been issued, while others indicate that they are issued quite freely. Several installations have a policy of issuing bar orders to all persons separated from the military service with a punitive or undesirable discharge, and one of these has reported an average of about 300 bar orders per year." Lt. Col. Jules B. Lloyd, *Unlawful Entry and Reentry Into Military Reservations in Violation of 18 U.S.C. § 1382*, thesis presented to The Judge Advocate General's School, United States Army, Charlottesville, Virginia (1970), *on file* at University of Virginia Law School Library. The results of Lt. Col. Lloyd's survey are summarized in his article drawn from the thesis, *supra* n.24, at 159-63.

would meet the test of *O'Brien*, the enforcement of § 1382 to all bar letter holders under the present system is far broader than *O'Brien* can countenance.

B. The First Amendment Bars Respondent's Conviction Because the Government's Enforcement of § 1382 Against Him Was Impermissibly Content-Based

Even when government reserves public property for "its intended purposes, communicative or otherwise," the First Amendment forbids attempts "to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association v. Perry Local Education Association*, 460 U.S. at 46. Accordingly, whether or not respondent had a First Amendment right to attend the Hickam open house, the conviction must be reversed.

1. The application of facially valid statutes to suppress or penalize the expression of unpopular views has long been condemned by this Court. Thus, in *Brown v. Louisiana*, the Court struck down a breach of the peace conviction where "the statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility." 383 U.S. at 142 (plurality opinion). Cases involving government property deemed not to be a public forum of any kind make the same point, upholding government exclusion of speech only where the limitation is viewpoint-neutral. The Court in *Greer v. Spock*, 424 U.S. at 838-39, emphasized that "there is no claim that the military authorities discriminated in any way among candidates for public office based upon the candidates' supposed political views."[60] In *Adderly*, 385 U.S. at 47, the Court explained that "there is not a shred of evidence

60 The Court cited approvingly *Jenness v. Forbes*, 351 F. Supp. 88 (D.R.I. 1972), where, after initially upholding a facially valid regulation barring candidates' speeches on a military base in a suit brought by a Socialist candidate, the district court held the regulation invalid as applied after the base commander permitted a partisan political campaign speech by Vice President Agnew.

in this record that this power was exercised . . . because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest," and emphasized both that the entire crowd was ordered off the jailhouse grounds and that no "similarly large groups" had ever been permitted to assemble. Perhaps closest to the instant case is *Schact v. United States*, where, after facially upholding a statute making it a crime to wear a military uniform without authority, 18 U.S.C. § 702,[61] the Court reversed petitioner's conviction because it was predicated on his criticism of the military during his performance. 398 U.S. at 47-49.[62]

2. The court of appeals concluded that respondent's "removal and the enforcement of his bar letter were precipitated solely by his peaceful expressive activities." Pet. App. 14a. The record amply supports the court of appeals' view. As the evidence summarized *supra* (Statement, pp. 4-6) demonstrates, the base commander undertook not to enforce previous bar letters but rather to suppress speech of a particular political stripe—"anti-defense" speech.[63] The apprehension of respond-

61 The Court relied on *United States v. O'Brien, supra.*

62 *See also United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 510-11 (1969); *Cox v. Louisiana I*, 379 U.S. at 557-58 (enforcement of facially valid regulations on demonstrating because of hostility to speakers' views would violate First Amendment); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (reversing conviction under facially valid regulation barring unusual noise in Pentagon concourse where record showed statute invoked because of official antipathy to demonstrators' views) (cited with approval in *Police Department of Chicago v. Mosley*, 408 U.S. at 97 n.4). Of course, the rule in these cases applies in the public forum context as well. *See, e.g., Heffron v. ISKCON*, 452 U.S. at 648-49; *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

63 *See, e.g.*, J.A. 9 (commander notifying chief of security police that "individuals were passing out leaflets and carrying *anti-defense* banners"); J.A. 49-50 (incident report recounting that "Major Jones/CSP . . . related that there were two personnel at the Armed Forces Aircraft Exhibit carrying

ent's leafletting and banner-carrying companions together with him, and their joint detention for three and one-half hours until after the open house had ended and the 50,000 attendees could no longer receive their message, is simply inconsistent with any suggestion that respondent was apprehended and evicted from the base for a viewpoint-neutral reason. Accordingly, since the record plainly establishes that respondent was excluded and § 1382 was invoked "because the [commander] objected to what was being . . . said by the demonstrato[r] or because he disagreed with the objectives of their protest" (*Adderly v. Florida*, 385 U.S. at 47; *see also Police Dept. of Chicago v. Mosley, supra*), the First Amendment forbids respondent's conviction.[64]

a protest sign against the arms race," and specifying anti-military nature of banner). This uncontradicted evidence, nearly all of it presented by the prosecution, renders inexplicable the government's suggestion (Br. 25) that "there is no showing that respondent was singled out for prosecution because he was associated with persons engaged in a demonstration much less because of the particular views of the demonstrators."

64 The United States has previously urged that "even a showing that respondent was apprehended for impermissible reasons would not be a defense to a criminal charge. *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (*citing Frisbie v. Collins*, 342 U.S. 519 (1952)). Respondent would have to show at least that his *prosecution* was improperly motivated." U.S. Reply Mem. 2 n.1. The First Amendment rule cited in *Brown, Adderly, Schact, Greer, Greenburgh Civic Associations*, and *Perry*, however, is quite to the contrary. It is inconceivable that the convictions in *Adderly* would have been upheld if there had been both civil rights and segregationist groups on the jailhouse grounds, and only the former had been excluded and therefore prosecuted for trespass. *See United States v. Crowthers, supra*. Moreover, it is plain in any event that respondent would not have been referred by Air Force personnel at Hickam to the civilian authorities for prosecution but for his association with "anti-defense" speech.

The additional suggestion that this claim was not presented below (Reply Mem. 2) is also in error. *See, e.g.*, T. 87 ("the point is that the Air Force embarked upon a course of action here of terminating people's rights to free speech and taking them on [sic] the base simply because . . . the commander didn't think that those ideas they were expressing were appropriate"); *see generally* T. 86-87.

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the judgment below be affirmed.

Respectfully submitted,

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March 4, 1985

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* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate awaiting admission to the Bar of the State of New York.

Addendum

AFM 190-9, Figure 4-4, "An Open House Checklist" (September 22, 1972)

OPEN HOUSE CHECKLIST

1. Date, Time, and Location

Is the event considered a suitable occasion?

Has the date been far enough ahead?

Is the date most suitable for the community and the base?

Does the date tie in with one famous in the history or background of the community?

Will important guests be available on the date selected?

What time will the event begin and end?

Where can exhibits be located, both on base and in the community?

Have restricted areas been determined?

Is the location large enough for expected crowds?

Has the event been cleared with higher headquarters?

Have sufficient committees and chairmen been appointed?

Are committee assignments explicit and all-inclusive?

2. Pre-Event Publicity

a. Press and Publications:

Have "teaser" releases been put out well in advance?

Will detailed releases be provided several days ahead of event?

Have personal invitations been sent to the press?

Have release dates and deadlines been considered?

Have special invitations been sent to newspaper DVs?

Will a press conference be held prior to the event?
Will a dry run take place at which newsmen may get a preview?
Will a pre-event briefing be necessary?
Have handouts and stock photos been prepared beforehand?
Have releases been mailed to interested trade publications?
Have invitations been sent to trade and industrial editors whose products or equipment might be utilized or displayed?
Will base papers be thoroughly supplied with material?
Has a series of releases been prepared for the daily bulletin?
Will the detailed program, including parking and traffic directions, be published at least one day in advance?

b. Radio:
How much time will be available, public service and otherwise?
Have spot announcements been prepared?
Have radio releases been coordinated with news releases?
Will the event lend itself to on-the-spot broadcasts?
Will DVs be available for interviews?
Have clearances for national hookups been secured?
Are out of town stations interested?
Is there a possibility of working the event into a network show?
If live broadcasts are not feasible, can recorders be utilized?
Will the announcer be able to inspect facilities beforehand?

Has the announcer been briefed in the event of an accident?
Have scripts been prepared and cleared?
Is filler and background material available for the announcer?
Are there sufficient power outlets for stations desiring coverage?
Can a special room be provided for broadcasting when crowd background noise is undesirable?

c. Television:
Will local stations cover the event?
If entire program cannot be presented, can parts of it be covered?
Have news releases, posters, and pertinent photos been supplied?
Can films or film strips be utilized?
Has a check been made with program director for possible tie-ins with existing programs?
Is there any public service time available?
Will coverage be made by remote pickup or by film?
Is extra power available for remote unit?
Have clearances for network programming been obtained?
Will DVs be available for interviews?
Can base personnel participate in pre-event programs?
Can good camera locations be provided?

d. Advertising and Promotion:
Is money available?
Are local merchants behind the event?
Will newspaper ads be sponsored by merchants?

Will trade journals sponsor ads?
Can announcements be made at civic and fraternal group meetings?
Will local theaters use film trailers?
Can exhibits be placed in hotel and theater lobbies and other strategic locations?
Can car bumper, taxi, bus, and streetcar signs be provided?
Can posters, placards, and window displays be utilized?
Can banners be put up on main street?
Can sound truck be operated both downtown and on-base?
Will local concerns use envelope stuffers?
Can billboards be utilized?
Can decals be used?
Will program and/or souvenir booklets be sponsored by advertising?
Have advance releases on DVs who will attend been provided to all media?

e. Speeches:
Who will write speeches?
Who will make speeches?
Will copies of speeches be provided in advance to media?
Have themes for speeches been selected?
Will speeches have to be cleared with higher headquarters?
Can speakers be provided to civic and fraternal organizations?
Who will introduce speaker?
Is speaker fully acquainted with the occasion?
Is an alternate speaker available?
Can occasion be utilized for a speech of major importance?
Will PA system be set up?

Is there a platform and speaker's stand?
Will the speaker or audience be facing the sun?
Will water and glass be at hand for the speaker?
Can speech be covered by media?
Can photographers get good shots of speaker?

f. Photos:
Are sufficient photos available for advance publicity?
Will the photo lab be available for visiting photographers?
Can photos be blown up for use in other displays?
Have individual photos been taken of key program personnel?
Will photos of exhibits be taken before event?
Have newsreel cameramen been informed of event?
Will base photo provide complete coverage of events?

3. Program
How many programs will be needed?
Has program been prepared in sufficient copies for distribution to key personnel?
Has program been coordinated with checklist to see that all items are taken care of?
Who will print programs?
Are funds available for program printing?
Will programs be sponsored by advertising?
Will there be any souvenir type programs?

Can programs be utilized to emphasize the Air Force mission?
What will program consist of?

a. Parade
Has a parade marshal been selected?
Have the Mayor and Chief of Police been consulted?
Has the Chamber of Commerce been consulted?
Will the community participate in the parade?
Can floats, civic organizations, school bands, and so forth, be included in the parade?
Has a suitable route been arranged?
Have starting, review, and dispersal points been designated?
Will there be a PA system and announcer to cover parade?
Will local police handle traffic and clear route?

• • •

4. Accommodations

a. Media:

Can a location be equipped as a press center?
Can a radio booth be prepared?
Will base technicians be able to assist radio personnel?
Can runners be provided for reporters and photographers?
Has transportation been arranged for media?
Has special parking been arranged?
Have passes and ID tags been secured for media personnel?
Can media equipment be adequately located?
Have copies of program been provided media in advance?

Will telegraph service be available?
Are extra telephones necessary?
Is there a special place set aside for observing feature attractions?
Can refreshments be provided?

• • •

5. Supporting Services

a. Civilian Personnel:
Have civilian personnel been included in the planning?
Have they been briefed on the event?
Can they be used as guides, escorts, hostesses, drivers, and so forth?
Will they get time off to compensate for additional work?

b. Civilian Police:
Has the local Chief of Police been fully informed?
Will the necessary police be posted?
Have the state or county police been notified, if necessary?
Will the roads to and from the base be patrolled on the day of the event?
Will civilian police be used on the base?
Have any changes in traffic regulations been coordinated?
Has full coordination been effected with the Chief, Security Police?
How will civilian miscreants picked up on the base be handled?
Will any plain-clothes men be needed?

c. Security & Law Enforcement
Has complete coordination been effected with the local police?
Will the guards and security police be properly dressed?
Has a special detail been selected to handle traffic and parking?

Has an honor guard been designated for DVs?
Can additional guards be secured from other installations if needed?

* * *

n. Signs and Placards:
Have all the signs for advertising been procured?
Have all the signs for information been made?
Who will place the signs in position?
Has coordination been effected with civil engineering?
Where will signs be located in town? On the base?
Have all warning signs been made, that is, "No Smoking," "Restricted," and so forth?
Can the signs be saved for future events?
Do all exhibits have placards or personnel to explain them?
Are placards available for downtown displays?
Will all signs be in place for the dry run, if conducted?

* * *

7. Follow-up
Will thank-you letters be sent to all who aided?
Will letters of appreciation or commendation be sent to military who performed outstanding jobs?
Will a file of letters of acceptance and regret be kept?
Can filmed showings of events be held?
Will photos be provided DVs and award recipients?

Has cleanup been complete and effective?
Can human interest articles of the day be furnished to the press?
Will congratulatory messages from manufacturers, organizations, and individuals be filed?
Can souvenir photo booklets be made?
Can these booklets be sent to media and DVs who attend? Also to those who were unable to attend?
Can decorations, exhibits, stands, signs, and placards be saved?
Is there a news story in the refreshment profits, if any?
Who will make a check of any injuries or incidents that may have occurred?

REPLY BRIEF

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No. 83-1624

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES VINCENT ALBERTINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 83-1624

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1. a. In our opening brief, we demonstrated that respondent violated the unambiguous prohibition of 18 U.S.C. 1382 when he reentered Hickam Air Force Base in 1981 (U.S. Br. 8-21). In responding to our argument, respondent carefully avoids discussing the plain language of Section 1382, and he does not claim that the legislative history directly supports his position. Instead, respondent principally emphasizes (*e.g.*, Br. 12-19) that the bar letter that formed the basis of his conviction was issued in 1972, nine years before the reentry for which he was prosecuted. As we noted in our opening brief, the court of appeals explicitly declined to reach the question whether respondent's bar letter was stale (see Pet. App. 4a, 15a), and there is no reason for this Court to consider that question in the first instance.[1] Moreover,

[1]In addition, we do not agree with respondent that this issue is comprised within the question that the Court asked the parties to address. Respondent suggests (Br. 13 n.21) that because his bar letter

even if the Court were to accept respondent's contention, the Court should not affirm the judgment of the court of appeals; it should vacate the judgment, which is based on First Amendment grounds, and order the case remanded for a new trial at which the government will be entitled to attempt to demonstrate that respondent was lawfully barred from Hickam in 1981.[2]

In any event, respondent's contention that he could not be convicted on the basis of his 1972 bar letter is incorrect. The plain language of Section 1382 imposes no limit on the duration of a bar order. Respondent does not suggest —and cannot plausibly suggest — that the Court should "legislate" some arbitrary number of years as a limitation on a bar order. Rather, respondent appears to agree with the principle — which we have at all times acknowledged (see Pet. 10;

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was issued in 1972, his attendance at the open house in 1981 did not constitute "reenter[ing]" Hickam within the meaning of Section 1382. But Section 1382 does not require a "reentry"; it requires only that respondent be "found within" Hickam. See U.S. Br. 9. Moreover, as we explain below, any limit on the permissible duration of a bar order derives not from Section 1382 itself but from a general requirement that administrative actions be reasonable.

[2]Before trial, respondent moved to dismiss the information on the ground that the 1972 bar letter was stale. See J.A. 63. The district court denied the motion. J.A. 1, 68. Accordingly, the case was — as respondent agrees (Br. 6 n.16) — tried by the government on the assumption that the 1972 bar letter was legally sufficient. As a result, the facts concerning the bar letter sent to respondent in March 1981 but allegedly not received by him (see J.A. 30) were not brought out at trial; nor were all the facts bearing on the reasonableness of continuing the 1972 bar order in force. Indeed, the extent to which evidence on these issues would even have been admissible at trial is unclear.

Accordingly, even if this Court (or the court of appeals) were to agree with respondent's contention that his 1972 bar letter was stale, respondent's prosecution would not be barred, as it evidently is under the court of appeals' ruling that his conduct was constitutionally protected. Instead, the proper remedy would be a retrial at which the government could attempt to show that a valid bar order was properly in effect against respondent in May 1981.

Reply Mem. 3; Br. 27-28) — that the duration of a bar letter is limited only by a general requirement of reasonableness.[3] Although the government had no reason to present evidence at trial demonstrating the reasonableness of the Air Force's decision to continue respondent's bar order in effect through May 1981 (see page 2 note 2, *supra*), even this record contains ample evidence of the reasonableness of that decision.

If respondent had committed only a minor misdeed in 1972 and had done nothing else that would suggest that he posed a danger to the security and good order of a military base, it might well have been unreasonable to continue his bar order in effect through 1981. But that is not at all the case. Respondent received his bar letter in 1972 for committing a criminal act of destructive vandalism, and — according to respondent's own testimony at trial — in the years between 1972 and 1981 he committed numerous acts that caused him to receive bar letters from other military installations in Hawaii (see J.A. 39). Specifically, respondent testified that only two months before the open house, he entered a sensitive military installation on Hawaii from which he had also previously been barred for the purpose of deliberately engaging in an illegal act — in respondent's words, "a rather serious clear-cut case of non-violent civil disobedience" (J.A. 30). Respondent also testified that he had received bar letters from "[p]retty much" every military installation in Hawaii (J.A. 39). One of the persons who demonstrated with respondent during the open house testified that all the members of their group were well aware of respondent's various bar orders, including the one that was

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[3]As we noted in our opening brief, Air Force regulations are to the same effect. See, *e.g.*, A.F. Reg. 355-11, para. 1.b (10 Sept. 1971) (a bar order "must be reasonable in relation to [the commander's] responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon").

the basis of this prosecution (J.A. 26). In these circumstances, there was nothing unreasonable about continuing respondent's bar letter in force through 1981.[4]

More fundamentally, however, respondent was not entitled simply to ignore a facially valid bar letter and reenter Hickam. If respondent wished to claim that his bar letter was stale, there was an obvious and appropriate forum open to him. The bar letter that respondent received stated that he was barred not "for life" — as respondent repeatedly asserts (Br. 10; see *id.* at 15, 17) — but until he obtained the written permission of the commanding officer, or his designee, to reenter the base. See J.A. 43. Respondent was free to apply to the commanding officer for permission to reenter on the ground that his bar letter should not continue in force any longer and, if permission was denied, to institute a suit for declaratory relief, claiming that the continuation of the bar order was arbitrary and capricious. See 5 U.S.C. 706; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Serrano Medina* v. *United States*, 709 F.2d 104 (1st Cir. 1983); *Bridges* v. *Davis*, 443 F.2d 970 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1972). Had respondent pursued this course, the reasonableness of the commanding officer's

[4]Respondent cites the legislative history of Section 1382 solely to support the proposition — with which we have no disagreement — that the second paragraph of Section 1382 was enacted "to vindicate the authority of commanders to eject unwelcome visitors" (Br. 17). Respondent suggests that enforcing his bar letter against him did not serve this purpose. But in his testimony, respondent admitted that he had repeatedly reentered military reservations for illegal purposes and in violation of bar letters. See J.A. 30-31, 38-39. As we noted in our opening brief (at 16 n.8), the legislative history shows that when the Congressman who introduced the bill that became Section 1382 described the conduct that it would proscribe, he used terms that almost perfectfly describe respondent's conduct: he spoke of individuals who "constantly def [y] authority by reappearing upon [a military] reservation" and "constantly return," notwithstanding orders to leave, "time after time" (42 Cong. Rec. 689 (1908) (remarks of Rep. Moon)).

decision to continue the bar order in effect could have been litigated in an orderly fashion in the appropriate proceeding instead of as a diversionary, collateral issue in a criminal prosecution.[5] Indeed, as we have noted, in asserting that it was unreasonable for the bar order to continue in effect through 1981, respondent is not invoking any defense made available by Section 1382 itself; rather, he is challenging the reasonableness of an administrative action. The proper way to raise such a challenge is to sue for specific relief under the Administrative Procedure Act, not to ignore the bar order and attempt to litigate the issue of reasonableness in a criminal prosecution. Cf. *Lewis* v. *United States*, 445 U.S. 55, 64, 67 (1980).[6]

b. We demonstrated in our opening brief that the second paragraph of Section 1382 — the provision under which respondent was convicted — applies not only to closed military installations but to installations that are open to public access. Indeed, as we explained, this provision has its principal application to open bases. See U.S. Br. 13-21.

Respondent explicitly acknowledges that our submission on this point is correct. Resp. Br. 21. Nonetheless, respondent attempts to distinguish between a base that is generally open to the public and a one-day open house at a normally closed base. We explained in our opening brief (at 18-21) why there is no principled basis for this distinction and why, as a practical matter, it is even more necessary to enforce

[5]In addition, if respondent had followed this course, the facts relating to his conduct on military installations since 1972 would have been brought before the commander of Hickam.

[6]As we noted in our opening brief (at 27), in *Flower* v. *United States*, 407 U.S. 197 (1972), the Court permitted the holder of a bar letter to raise, as a defense in a criminal prosecution, the claim that the bar letter was issued for unconstitutional purposes. But a constitutional claim is obviously on a different footing from the claim of temporal unreasonableness that respondent raises.

bar letters at a one-day open house than at a base that is normally open. Respondent's only reply appears to be that during an open house, "the usual military functions are suspended and all sorts of activities normally treated as inappropriate in the military context are conducted" (Br. 21-22).

We note that even during an open house, sensitive military operations — including, for example, the storage of equipment and documents — routinely take place elsewhere on the installation. And respondent does not explain why an open house is an "inappropriate" military function. But most important, respondent ignores the fact that many daily occurrences on an open base unquestionably have far less to do with "the usual military functions" than events at an open house. Respondent is simply incorrect in asserting that when a base is generally open to the public, visitors are allowed only if their "presence is consistent with military need" (Br. 21); an open base is different from a closed base precisely because visitors to an open base are *not* screened for this purpose. For example, on an open base civilians may use the thoroughfares to conduct normal business wholly unrelated to the military. See, *e.g.*, *Greer* v. *Spock*, 424 U.S. 828, 830 (1976). Respondent nonetheless expressly acknowledges that Section 1382 applies in such circumstances. Respondent's contention that Section 1382 does not apply to an open house because an open house involves "non-military" activities is, therefore, without foundation.

Respondent also appears to suggest (see Br. 20) that it was somehow unfair for the military to enforce his bar letter against him when it had invited the public at large to the open house. But the entire purpose of a bar letter is to inform the recipient that he is in a separate category from the general public; a bar letter *is*, precisely, a notification to the recipient that he must now obtain special permission — permission of a form that others need not obtain —

before he can enter the base. Respondent explicitly concedes (Br. 21) that the recipient of a bar letter violates Section 1382 if, without obtaining such permission, he enters a base that is generally open to the public; nothing in Section 1382, or in the general principles of trespass law on which respondent attempts to rely, provides any support for the view that a different result should obtain when the public is informed that a generally closed base will be open on one particular day.[7]

c. Finally, respondent suggests that he did not have the state of mind required to establish a violation of Section 1382. It is undisputed that respondent knew he had received a bar letter, and it is undisputed that he deliberately entered what he knew to be the military base to which that letter applied. Respondent cites no case that remotely suggests that Section 1382 — or any other criminal statute — requires any more. In essence, respondent appears to contend that even if he has no valid defense, he should be immune from criminal liability because he *thought* he had a valid defense (see Resp. Br. 23-26); this extraordinary suggestion is without support in the law. Cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).[8]

2. As we explained in our opening brief (at 21-40), Section 1382, as enforced against respondent, is a limited, neutral regulation that is unrelated not only to the content

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[7]The Model Penal Code, on which respondent relies heavily (see, *e.g.* Resp. Br. 20-23), does not in any way support his effort to distinguish between a base that is generally open and a base that is open for only one day each year. The Model Penal Code states that persons who enter property open to the public have a defense to a charge of criminal trespass only if they "compl[y] with all lawful conditions imposed on access" (Model Penal Code § 221.2(3)(b) (1980)); respondent's bar letter was a lawful condition with which he did not comply.

[8]Under Section 1382, it is the base commander — not the recipient of a bar letter — who is empowered to decide whether it is reasonable to allow a recipient to reenter the base on a particular occasion.

of respondent's speech but to the fact that he was engaging in speech, and that had only an incidental impact on his speech. Respondent continues to be unable to cite a single case of this Court holding that such a statute violates the First Amendment. Ironically, respondent relies primarily on *Adderley* v. *Florida*, 385 U.S. 39 (1966), where the Court *upheld* a restriction that had an incidental effect on speech. The Court in *Adderley* based its decision on the fact that the restriction in issue was "aimed at conduct of one limited kind" and provided "no lack of notice" (385 U.S. at 42); the same is true of Section 1382, which is aimed at a particular category of conduct that the government has a strong interest in preventing and that is defined without reference to speech.[9]

CONCLUSION

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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[9]Respondent renews his contention (see Br. in Opp. 23-25) that he was unlawfully singled out for prosecution because of his speech-related activities. But the record shows — and the district court specifically found (Tr. 98) — that the officer who apprehended respondent knew that respondent was the holder of a bar letter and, for that reason, took care to identify respondent before apprehending him. See J.A. 9-11, 13-14, 35; U.S. Br. 4. In addition, as we explained in our reply memorandum supporting the petition (at 1-3), the question whether respondent's prosecution was improperly motivated was not raised by respondent in either the district court or the court of appeals and is accordingly not now in issue.

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